

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 19—SMALL BUSINESS PROGRAMS

Sec.

19.000 Scope of part.

19.001 Definitions.

Subpart 19.1—Size Standards

19.101 Definitions.

19.102 Small business size standards and North American Industry Classification System codes.

19.103 Appealing the contracting officer's North American Industry Classification System code and size standard determination.

Subpart 19.2—Policies

19.201 General policy.

19.202 Specific policies.

19.202-1 Encouraging small business participation in acquisitions.

19.202-2 Locating small business sources.

19.202-3 Equal low bids.

19.202-4 Solicitation.

19.202-5 Data collection and reporting requirements.

19.202-6 Determination of fair market price.

19.203 Relationship among small business programs.

Subpart 19.3—Determination of Small Business Size and Status for Small Business Programs

19.301 Representations and rerepresentations.

19.301-1 Representation by the offeror.

19.301-2 Rerepresentation by a contractor that represented itself as a small business concern.

19.301-3 Rerepresentation by a contractor that represented itself as other than a small business concern.

19.302 Protesting a small business representation or rerepresentation.

19.303 [Reserved]

19.304 Disadvantaged business status.

19.304 Small disadvantaged business status.

19.305 Reviews and protests of SDB status.

19.306 Protesting a firm's status as a HUBZone small business concern.

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

19.309 Solicitation provisions and contract clauses.

Subpart 19.4—Cooperation With the Small Business Administration

19.401 General.

19.402 Small Business Administration procurement center representatives.

19.403 Small Business Administration breakout procurement center representatives.

Subpart 19.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

19.501 General.

19.502 Setting aside acquisitions.

19.502-1 Requirements for setting aside acquisitions.

19.502-2 Total small business set-asides.

19.502-3 Partial set-asides of contracts other than multiple-award contracts.

19.502-4 Partial set-asides of multiple-award contracts.

19.502-5 Insufficient reasons for not setting aside an acquisition.

19.502-6 Setting aside a class of acquisitions for small business.

19.502-7 Inclusion of Federal Prison Industries, Inc.

19.502-8 Rejecting Small Business Administration recommendations.

19.502-9 Withdrawing or modifying small business set-asides.

19.502-10 Automatic dissolution of a small business set-aside.

19.503 Reserves.

19.504 Orders under multiple-award contracts.

19.505 Limitations on subcontracting and nonmanufacturer rule.

19.506 Documentation requirements.

19.507 Solicitation provisions and contract clauses.

Subpart 19.6—Certificates of Competency and Determinations of Responsibility

19.601 General.

19.602 Procedures.

19.602-1 Referral.

19.602-2 Issuing or denying a certificate of competency (COC).

19.602-3 Resolving differences between the agency and the Small Business Administration.

19.602-4 Awarding the contract.

Subpart 19.7—The Small Business Subcontracting Program

19.701 Definitions.

19.702 Statutory requirements.

Federal Acquisition Regulation

19.000

- 19.703 Eligibility requirements for participating in the program.
- 19.704 Subcontracting plan requirements.
- 19.705 Responsibilities of the contracting officer under the subcontracting assistance program.
 - 19.705-1 General.
 - 19.705-2 Determining the need for a subcontracting plan.
 - 19.705-3 Preparing the solicitation.
 - 19.705-4 Reviewing the subcontracting plan.
 - 19.705-5 Awards involving subcontracting plans.
 - 19.705-6 Postaward responsibilities of the contracting officer.
 - 19.705-7 Liquidated damages.
- 19.706 Responsibilities of the cognizant administrative contracting officer.
- 19.707 The Small Business Administration's role in carrying out the program.
- 19.708 Contract clauses.

Subpart 19.8—Contracting With the Small Business Administration (the 8(a) Program)

- 19.800 General.
- 19.801 [Reserved]
- 19.802 Determining eligibility for the 8(a) program.
- 19.803 Selecting acquisitions for the 8(a) program.
- 19.804 Evaluation, offering, and acceptance.
 - 19.804-1 Agency evaluation.
 - 19.804-2 Agency offering.
 - 19.804-3 SBA acceptance.
 - 19.804-4 Repetitive acquisitions.
 - 19.804-5 Basic ordering agreements.
 - 19.804-6 Indefinite-delivery contracts.
- 19.805 Competitive 8(a).
 - 19.805-1 General.
 - 19.805-2 Procedures.
- 19.806 Pricing the 8(a) contract.
- 19.807 Estimating the fair market price.
- 19.808 Contract negotiation.
 - 19.808-1 Sole source.
 - 19.808-2 Competitive.
- 19.809 Preaward considerations.
 - 19.809-1 Preaward survey.
- 19.809-2 Limitations on subcontracting and nonmanufacturer rule.
- 19.810 SBA appeals.
- 19.811 Preparing the contracts.
 - 19.811-1 Sole source.
 - 19.811-2 Competitive.
 - 19.811-3 Contract clauses.
- 19.812 Contract administration.
- 19.813 Protesting an 8(a) participant's eligibility or size status.
- 19.814 Requesting a formal size determination (8(a) sole source requirements).
- 19.815 Release for non-8(a) procurement.
- 19.816 Exiting the 8(a) program.

Subparts 19.9–19.12 [Reserved]

Subpart 19.13—Historically Underutilized Business Zone (HUBZone) Program

- 19.1301 General.
- 19.1302 Applicability.
- 19.1303 Status as a HUBZone small business concern.
- 19.1304 Exclusions.
- 19.1305 HUBZone set-aside procedures.
- 19.1306 HUBZone sole source awards.
- 19.1307 Price evaluation preference for HUBZone small business concerns.
- 19.1308 Limitations on subcontracting and nonmanufacturer rule.
- 19.1309 Contract clauses.

Subpart 19.14—Service-Disabled Veteran-Owned Small Business Procurement Program

- 19.1401 General.
- 19.1402 Applicability.
- 19.1403 Status as a service-disabled veteran-owned small business concern.
- 19.1404 Exclusions.
- 19.1405 Service-disabled veteran-owned small business set-aside procedures.
- 19.1406 Sole source awards to service-disabled veteran-owned small business concerns.
- 19.1407 Limitations on subcontracting and nonmanufacturer rule.
- 19.1408 Contract clause.

Subpart 19.15—Women-Owned Small Business Program

- 19.1500 General.
- 19.1501 Definition.
- 19.1502 Applicability.
- 19.1503 Status.
- 19.1504 Exclusions
- 19.1505 Set-aside procedures.
- 19.1506 Women-Owned Small Business Program sole source awards.
- 19.1507 Limitations on subcontracting and nonmanufacturer rule.
- 19.1508 Contract clauses.

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42240, Sept. 19, 1983, unless otherwise noted.

19.000 Scope of part.

(a) This part implements the acquisition-related sections of the Small Business Act (15 U.S.C. 631, *et seq.*), applicable sections of the Armed Services Procurement Act (10 U.S.C. 2302, *et seq.*), 41 U.S.C. 3104, and Executive Order 12138, May 18, 1979. It covers—

(1) The determination that a concern is eligible for participation in the programs identified in this part;

(2) The respective roles of executive agencies and the Small Business Administration (SBA) in implementing the programs;

(3) Setting acquisitions aside, in total or in part, for exclusive competitive participation by small business, 8(a) participants, HUBZone small business concerns, service-disabled veteran-owned small business concerns, and economically disadvantaged women-owned small business (EDWOSB) concerns and women-owned small business (WOSB) concerns eligible under the WOSB Program;

(4) The certificate of competency program;

(5) The subcontracting assistance program;

(6) The “8(a)” business development program (hereafter referred to as 8(a) program), under which agencies contract with the SBA for goods or services to be furnished under a subcontract by a small disadvantaged business concern;

(7) The use of a price evaluation preference for HUBZone small business concerns;

(8) The use of veteran-owned small business concerns;

(9) Sole source awards to HUBZone small business concerns, service-disabled veteran-owned small business concerns, and EDWOSB concerns and WOSB concerns eligible under the WOSB Program; and

(10) The use of reserves.

(b) This part, except for subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide.

[48 FR 42240, Sept. 19, 1983, as amended at 59 FR 64785, Dec. 15, 1994; 59 FR 67036, Dec. 28, 1994; 63 FR 35721, June 30, 1998; 63 FR 36122, July 1, 1998; 63 FR 70268, Dec. 18, 1998; 64 FR 10536, Mar. 4, 1999; 65 FR 60544, Oct. 11, 2000; 68 FR 28081, May 22, 2003; 69 FR 25276, May 5, 2004; 71 FR 220, Jan. 3, 2006; 75 FR 77729, Dec. 13, 2010; 76 FR 18309, Apr. 1, 2011; 79 FR 24202, Apr. 29, 2014; 79 FR 61750, Oct. 14, 2014; 80 FR 81890, Dec. 31, 2015; 82 FR 4726, Jan. 13, 2017; 85 FR 11757, Feb. 27, 2020]

19.001 Definitions.

As used in this part—

Concern means any business entity organized for profit (even if its ownership is in the hands of a nonprofit entity) with a place of business located in

the United States or its outlying areas and that makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, material and/or labor, etc. “Concern” includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For more information, see 13 CFR 121.105.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost (see 19.202–6).

Industry means all concerns primarily engaged in similar lines of activity, as listed and described in the North American Industry Classification system (NAICS) manual.

Nonmanufacturer means a concern that furnishes a product it did not manufacture or produce (see 13 CFR 121.406).

[51 FR 2650, Jan. 17, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.001, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

Subpart 19.1—Size Standards

19.101 Definitions.

As used in this subpart—

Affiliates means business concerns, one of whom directly or indirectly controls or has the power to control the others, or a third party or parties control or have the power to control the others. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. SBA determines affiliation based on the factors set forth at 13 CFR 121.103.

Annual receipts. (1) Annual receipts of a concern which has been in business for 3 or more complete fiscal years means the annual average gross revenue of the concern taken for the last 3 fiscal years. For the purpose of this definition, gross revenue of the concern includes revenues from sales of products and services, interest, rents, fees, commissions and/or whatever other sources derived, but less returns and

allowances, sales of fixed assets, inter-affiliate transactions between a concern and its domestic and foreign affiliates, and taxes collected for remittance (and if due, remitted) to a third party. Such revenues shall be measured as entered on the regular books of account of the concern whether on a cash, accrual, or other basis of accounting acceptable to the U.S. Treasury Department for the purpose of supporting Federal income tax returns, except when a change in accounting method from cash to accrual or accrual to cash has taken place during such 3-year period, or when the completed contract method has been used.

(i) In any case of a change in accounting method from cash to accrual or accrual to cash, revenues for such 3-year period shall, prior to the calculation of the annual average, be restated to the accrual method. In any case, where the completed contract method has been used to account for revenues in such 3-year period, revenues must be restated on an accrual basis using the percentage of completion method.

(ii) In the case of a concern which does not keep regular books of accounts, but which is subject to U.S. Federal income taxation, *annual receipts* shall be measured as reported, or to be reported to the U.S. Treasury Department, Internal Revenue Service, for Federal income tax purposes, except that any return based on a change in accounting method or on the completed contract method of accounting must be restated as provided for in the preceding paragraphs.

(2) Annual receipts of a concern that has been in business for less than 3 complete fiscal years means its total receipts for the period it has been in business, divided by the number of weeks including fractions of a week that it has been in business, and multiplied by 52. In calculating total receipts, the definitions and adjustments related to a change of accounting method and the completed contract method of paragraph (1) of this definition, are applicable.

Number of employees is a measure of the average employment of a business concern and means its average employment, including the employees of its domestic and foreign affiliates, based

on the number of persons employed on a full-time, part-time, temporary, or other basis during each of the pay periods of the preceding 12 months. If a business has not been in existence for 12 months, *number of employees* means the average employment of such concern and its affiliates during the period that such concern has been in existence based on the number of persons employed during each of the pay periods of the period that such concern has been in business. If a business has acquired an affiliate during the applicable 12-month period, it is necessary, in computing the applicant's number of employees, to include the affiliate's number of employees during the entire period, rather than only its employees during the period in which it has been an affiliate. The employees of a former affiliate are not included, even if such concern had been an affiliate during a portion of the period.

[51 FR 2650, Jan. 17, 1986, as amended at 64 FR 32743, June 17, 1999; 64 FR 72444, Dec. 27, 1999; 65 FR 46055, July 26, 2000; 66 FR 2129, Jan. 10, 2001; 68 FR 28081, May 22, 2003; 75 FR 77729, Dec. 13, 2010; 84 FR 47864, Sept. 10, 2019]

19.102 Small business size standards and North American Industry Classification System codes.

(a) *Locating size standards and North American Industry Classification System codes.* (1) SBA establishes small business size standards on an industry-by-industry basis. Small business size standards and corresponding North American Industry Classification System (NAICS) codes are provided at 13 CFR 121.201. They are also available at <https://www.sba.gov/document/support-table-size-standards>".

(2) NAICS codes are updated by the Office of Management and Budget through its Economic Classification Policy Committee every five years. New NAICS codes are not available for use in Federal contracting until SBA publishes corresponding size standards. NAICS codes are available from the U.S. Census Bureau at <https://www.census.gov/eos/www/naics/>.

(b) *Determining the appropriate NAICS codes for the solicitation.* (1) Unless required to do otherwise by paragraph (b)(2)(ii)(B) of this section, contracting officers shall assign one NAICS code

and corresponding size standard to all solicitations, contracts, and task and delivery orders. The contracting officer shall determine the appropriate NAICS code by classifying the product or service being acquired in the one industry that best describes the principal purpose of the supply or service being acquired. Primary consideration is given to the industry descriptions in the U.S. NAICS Manual, the product or service descriptions in the solicitation, the relative value and importance of the components of the requirement making up the end item being procured, and the function of the goods or services being purchased. A procurement is usually classified according to the component that accounts for the greatest percentage of contract value.

(2)(i) For solicitations issued on or before October 1, 2022, that will result in multiple-award contracts, the contracting officer shall assign a NAICS code in accordance with paragraph (b)(1) of this section.

(ii) For solicitations issued after October 1, 2022, that will result in multiple-award contracts, the contracting officer shall—

(A) Assign a single NAICS code (and corresponding size standard) that best describes the principal purpose of both the acquisition and each subsequent order; or

(B) Divide the acquisition into distinct portions or categories (e.g., line item numbers, Special Item Numbers, sectors, functional areas, or equivalent) and assign each portion or category a single NAICS code and size standard that best describes the principal purpose of the supplies or services to be acquired under that distinct portion or category.

(3)(i) When placing orders under multiple-award contracts with a single NAICS code, the contracting officer shall assign the order the same NAICS code and corresponding size standard designated in the contract.

(ii) When placing orders under multiple-award contracts with more than one NAICS code, the contracting officer shall assign the order the NAICS code and corresponding size standard designated in the contract for the distinct portion or category against which the order is placed. If an order covers

multiple portions or categories, select the NAICS code and corresponding size standard designated in the contract for the distinct portion or category that best represents the principal purpose of the order.

(4) The contracting officer's designation is final unless appealed in accordance with the procedures in 19.103.

(c) *Application of small business size standards to solicitations.* (1) The contracting officer shall apply the size standard in effect on the date the solicitation is issued.

(2) The contracting officer may amend the solicitation and use the new size standard if SBA amends the size standard and it becomes effective before the due date for receipt of initial offers.

[85 FR 11757, Feb. 27, 2020, as amended at 85 FR 27101, May 6, 2020]

19.103 Appealing the contracting officer's North American Industry Classification System code and size standard determination.

(a) The contracting officer's determination is final unless appealed as follows:

(1) An appeal of a contracting officer's NAICS code designation and the applicable size standard shall be served and filed within 10 calendar days after the issuance of the initial solicitation or any amendment affecting the NAICS code or size standard. However, SBA may file a NAICS code appeal at any time before offers are due.

(2) Appeals of a contracting officer's NAICS code designation or applicable size standard may be filed with SBA's Office of Hearings and Appeals (OHA) by—

(i) Any person adversely affected by a NAICS code designation or applicable size standard. However, with respect to a particular sole source 8(a) contract, only the SBA Associate Administrator for Business Development may appeal a NAICS code designation; or

(ii) The Associate or Assistant Director for the SBA program involved, through SBA's Office of General Counsel.

(3) Contracting officers shall advise the public, by amendment to the solicitation, of the existence of a NAICS

code appeal (see 5.102(a)(1)). Such notices shall include the procedures and the deadline for interested parties to file and serve arguments concerning the appeal.

(4) SBA's OHA will dismiss summarily an untimely NAICS code appeal.

(5) NAICS code appeals are filed in accordance with 13 CFR 121.1103.

(6) Upon receipt of a NAICS code appeal, OHA will notify the contracting officer by a notice and order of the date OHA received the appeal, the docket number, and the Administrative Judge assigned to the case. The contracting officer's response to the appeal, if any, shall include argument and evidence (see 13 CFR part 134), and shall be received by OHA within 15 calendar days from the date of the docketing notice and order, unless otherwise specified by the Administrative Judge. Upon receipt of OHA's docketing notice and order, the contracting officer shall withhold award, unless withholding award is not in the best interests of the Government, and immediately send to OHA an electronic link to or a paper copy of both the original solicitation and all amendments relating to the NAICS code appeal. The contracting officer shall inform OHA of any amendments, actions, or developments concerning the procurement in question.

(7) After close of record, OHA will issue a decision and inform the contracting officer. If OHA's decision is received by the contracting officer before the date the offers are due, the decision shall be final and the solicitation shall be amended to reflect the decision, if appropriate. OHA's decision received after the due date of the initial offers shall not apply to the pending solicitation but shall apply to future solicitations of the same products or services.

(b) SBA's regulations concerning appeals of NAICS code designations are located at 13 CFR 121.1102 to 121.1103 and 13 CFR part 134.

[85 FR 11758, Feb. 27, 2020]

Subpart 19.2—Policies

19.201 General policy.

(a) It is the policy of the Government to provide maximum practicable oppor-

tunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

(b) Heads of contracting activities are responsible for effectively implementing the small business programs within their activities, including achieving program goals. They are to ensure that contracting and technical personnel maintain knowledge of small business program requirements and take all reasonable action to increase participation in their activities' contracting processes by these businesses.

(c) The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization (see section 15(k) of the Small Business Act). For the Department of Defense, in accordance with section 904 of Public Law 109-163 (10 U.S.C. 144 note), the Office of Small and Disadvantaged Business Utilization has been redesignated as the Office of Small Business Programs. Management of the office is the responsibility of an officer or employee of the agency who, in carrying out the purposes of the Act—

(1) Is known as the Director of the Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, the Director of the Office of Small Business Programs;

(2) Is appointed by the agency head;

(3) Is responsible to and reports directly to the agency head or the deputy to the agency head (except that for the Department of Defense, the Director of the Office of Small Business Programs reports to the Secretary or the Secretary's designee);

(4) Is responsible for the agency carrying out the functions and duties in

sections 8, 15, 31, 36, and 44 of the Small Business Act;

(5) Works with the SBA procurement center representative (PCR) (or, if a PCR is not assigned, see 19.402(a)) to identify proposed solicitations that involve bundling and work with the agency acquisition officials and SBA to revise the acquisition strategies for such proposed solicitations to increase the probability of participation by small businesses;

(6) Assists small business concerns in obtaining payments under their contracts, late payment interest penalties, or information on contractual payment provisions;

(7) Has supervisory authority over agency personnel to the extent that their functions and duties relate to sections 8, 15, 31, 36, and 44 of the Small Business Act;

(8) Assigns a small business technical advisor to each contracting activity within the agency to which the SBA has assigned a representative (see 19.402)—

(i) Who is a full-time employee of the contracting activity, well qualified, technically trained, and familiar with the supplies or services contracted for by the activity; and

(ii) Whose principal duty is to assist the SBA's assigned representative in performing functions and duties relating to sections 8, 15, 31, 36, and 44 of the Small Business Act;

(9) Cooperates and consults on a regular basis with the SBA in carrying out the agency's functions and duties in sections 8, 15, 31, 36, and 44 of the Small Business Act;

(10) Makes recommendations in accordance with agency procedures as to whether a particular acquisition should be awarded under subpart 19.5 as a small business set-aside, under subpart 19.8 as a section 8(a) award, under subpart 19.13 as a HUBZone set-aside, under subpart 19.14 as a service-disabled veteran-owned small business set-aside, or under subpart 19.15 as a set-aside for economically disadvantaged women-owned small business (EDWOSB) concerns or women-owned small business (WOSB) concerns eligible under the WOSB Program;

(11) Conducts annual reviews to assess the—

(i) Extent to which small businesses are receiving a fair share of Federal procurements, including contract opportunities under the programs administered under the Small Business Act;

(ii) Adequacy of consolidated or bundled contract documentation and justifications; and

(iii) Actions taken to mitigate the effects of necessary and justified consolidation or bundling on small businesses;

(12) Provides a copy of the assessment made under paragraph (c)(11) of this section to the Agency Head and SBA Administrator;

(13) Provides to the chief acquisition officer and senior procurement executive advice and comments on acquisition strategies, market research, and justifications related to consolidation of contract requirements;

(14) When notified by a small business concern prior to the award of a contract that the small business concern believes that a solicitation, request for proposal, or request for quotation unduly restricts the ability of the small business concern to compete for the award—

(i) Submits the notification by the small business concern to the contracting officer and, if necessary, recommends ways in which the solicitation, request for proposal, or request for quotation may be altered to increase the opportunity for competition; and

(ii) Informs the advocate for competition of such agency (as established under 41 U.S.C 1705 or 10 U.S.C. 2318) of such notification;

(15) Ensures agency purchases using the Governmentwide purchase card that are greater than the micro-purchase threshold and less than the simplified acquisition threshold were made in compliance with the Small Business Act and were properly recorded in accordance with subpart 4.6 in the Federal Procurement Data System;

(16) Assists small business contractors and subcontractors in finding resources for education and training on compliance with contracting regulations;

(17) Reviews all subcontracting plans required by 19.702(a) to ensure the plan provides maximum practicable opportunity for small business concerns to

Federal Acquisition Regulation

19.202-1

participate in the performance of the contract; and

(18) Performs other duties listed at 15 U.S.C. 644(k).

(d) Small business specialists shall be appointed and act in accordance with agency regulations.

(1) The contracting activity shall coordinate with the small business specialist as early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a solicitation, or prior to placing an order without a solicitation when the acquisition meets the dollar thresholds set forth at 7.107-4(a)(1). See also 7.104(d).

(2) The small business specialist shall notify the agency's Director of the Office of Small and Disadvantaged Business Utilization, and for the Department of Defense, the Director of the Office of Small Business Programs, when the criteria relating to substantial bundling at 7.107-4(a)(1) are met.

(3) The small business specialist shall coordinate with the contracting activity and the SBA PCR on all determinations and findings required by 7.107 for consolidation or bundling of contract requirements.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.201, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.202 Specific policies.

In order to further the policy in 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of the Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, the Director of the Office of Small Business Programs, or the Director's designee, as to whether a particular acquisition should be awarded under subpart 19.5, 19.8, 19.13, 19.14, or 19.15. Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. The contracting officer shall document the contract file whenever

the Director's recommendations are not accepted, in accordance with 19.506.

[85 FR 11758, Feb. 27, 2020]

19.202-1 Encouraging small business participation in acquisitions.

Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government's interest. When applicable, the contracting officer shall take the following actions:

(a) Divide proposed acquisitions of supplies and services (except construction) into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement.

(b) Plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by SBA against loss under 15 U.S.C. 694b.

(c) Ensure that delivery schedules are established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government.

(d) Encourage prime contractors to subcontract with small business concerns (see subpart 19.7).

(e)(1) Provide a copy of the proposed acquisition package and other reasonably obtainable information related to the acquisition to the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) at least 30 days prior to the issuance of the solicitation if—

(i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract;

(ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; or

(iii) The proposed acquisition is for a consolidated or bundled requirement.

19.202-2

(See 7.107-5(a) for mandatory 30-day notice requirement to incumbent small business concerns.) The contracting officer shall provide all information relative to the justification for the consolidation or bundling, including the acquisition plan or strategy, and if the acquisition involves substantial bundling, the information identified in 7.107-4. The contracting officer shall also provide the same information to the agency Office of Small and Disadvantaged Business Utilization.

(2) Provide a statement explaining why the—

(i) Proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) Delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government;

(iii) Proposed acquisition cannot be structured so as to make it likely that small businesses can compete for the prime contract;

(iv) Consolidated construction project cannot be acquired as separate discrete projects; or

(v) Consolidation or bundling is necessary and justified.

(3) Process the 30-day notification concurrently with other processing steps required prior to the issuance of the solicitation.

(4) If the contracting officer rejects the SBA PCR's recommendation made in accordance with 19.402(c)(2), document the basis for the rejection and notify the SBA PCR in accordance with 19.502-8.

[48 FR 42240, Sept. 19, 1983, as amended at 56 FR 67132, Dec. 27, 1991; 57 FR 60581, Dec. 21, 1992; 64 FR 72444, Dec. 27, 1999; 65 FR 46055, July 26, 2000; 68 FR 60006, Oct. 20, 2003; 71 FR 36925, June 28, 2006; 81 FR 67773, Sept. 30, 2016; 85 FR 11758, Feb. 27, 2020]

19.202-2 Locating small business sources.

The contracting officer shall, to the extent practicable, encourage maximum participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small dis-

48 CFR Ch. 1 (10-1-20 Edition)

advantaged business, and women-owned small business concerns in acquisitions by taking the following actions:

(a) Before issuing solicitations, make every reasonable effort to find additional small business concerns (see 10.002(b)(2)). This effort should include contacting the agency small business specialist and SBA PCR (or, if a PCR is not assigned, see 19.402(a)).

(b) Publicize solicitations and contract awards through the Government-wide point of entry (see subparts 5.2 and 5.3).

[48 FR 42240, Sept. 19, 1983, as amended at 63 FR 70268, Dec. 18, 1998; 65 FR 60544, Oct. 11, 2000; 66 FR 27413, May 16, 2001; 68 FR 43856, July 24, 2003; 71 FR 36925, June 28, 2006; 85 FR 11759, Feb. 27, 2020]

19.202-3 Equal low bids.

In the event of equal low bids (see 14.408-6), awards shall be made first to small business concerns which are also labor surplus area concerns, and second to small business concerns which are not also labor surplus area concerns.

[60 FR 48261, Sept. 18, 1995]

19.202-4 Solicitation.

The contracting officer shall encourage maximum response to solicitations by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns by taking the following actions:

(a) Allow the maximum amount of time practicable for the submission of offers.

(b) Furnish specifications, plans, and drawings with solicitations, or furnish information as to where they may be obtained or examined.

(c) Provide to any small business concern, upon its request, a copy of solicitations with respect to any contract to be let, the name and telephone number of an agency contact to answer questions related to such prospective contract and adequate citations to each major Federal law or agency rule with which such business concern must comply in performing such contract other than laws or agency rules with which the small business must comply

when doing business with other than the Government.

[48 FR 42240, Sept. 19, 1983, as amended at 63 FR 70268, Dec. 18, 1998; 65 FR 60544, Oct. 11, 2000; 68 FR 43856, July 24, 2003; 85 FR 11759, Feb. 27, 2020]

19.202-5 Data collection and reporting requirements.

Agencies shall measure the extent of small business participation in their acquisition programs by taking the following actions:

(a) Require each prospective contractor to represent whether it is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, women-owned small business, EDWOSB concern, or WOSB concern eligible under the WOSB Program (see the provision at 52.219-1, Small Business Program Representations).

(b) Accurately measure the extent of participation by small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in Government acquisitions in terms of the total value of contracts placed during each fiscal year, and report data to the SBA at the end of each fiscal year (see subpart 4.6).

(c) When the contract includes the clause at 52.219-28, Post Award Small Business Program Rerepresentation, and the conditions in the clause for rerepresenting are met—

(1) Require a contractor that represented itself as any of the small business concerns identified in 19.000(a)(3) prior to award of the contract to rerepresent its size and socioeconomic status (*i.e.*, 8(a), small disadvantaged business, HUBZone small business, service-disabled veteran-owned small business, EDWOSB, or WOSB status); and

(2) Permit a contractor that represented itself as other than a small business concern prior to award to rerepresent its size status.

[48 FR 42240, Sept. 19, 1983, as amended at 60 FR 48261, Sept. 18, 1995; 63 FR 70268, Dec. 18, 1998; 65 FR 60544, Oct. 11, 2000; 72 FR 36854, July 5, 2007; 74 FR 11825, Mar. 19, 2009; 76 FR 18309, Apr. 1, 2011; 85 FR 11759, Feb. 27, 2020]

19.202-6 Determination of fair market price.

(a) The fair market price shall be the price achieved in accordance with the reasonable price guidelines in 15.404-1(b) for—

(1) Total and partial small business set-asides, and reserves (see subpart 19.5);

(2) HUBZone set-asides (see subpart 19.13);

(3) Contracts utilizing the price evaluation preference for HUBZone small business concerns (see subpart 19.13);

(4) Service-disabled veteran-owned small business set-asides (see subpart 19.14).

(5) Set-asides for EDWOSB concerns and WOSB concerns eligible under the WOSB Program (see subpart 19.15).

(b) For 8(a) contracts, both with respect to meeting the requirement at 19.806(b) and in order to accurately estimate the current fair market price, contracting officers shall follow the procedures at 19.807.

[52 FR 38189, Oct. 14, 1987, as amended at 53 FR 43390, Oct. 26, 1988; 54 FR 46005, Oct. 31, 1989; 62 FR 51270, Sept. 30, 1997; 63 FR 35722, June 30, 1998; 63 FR 70268, Dec. 18, 1998; 69 FR 25276, May 5, 2004; 76 FR 18309, Apr. 1, 2011; 79 FR 61750, Oct. 14, 2014; 85 FR 11759, Feb. 27, 2020]

19.203 Relationship among small business programs.

(a) There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15).

(b) *At or below the simplified acquisition threshold.* For acquisitions of supplies or services that have an anticipated dollar value above the micro-purchase threshold, but at or below the simplified acquisition threshold, the requirement at 19.502-2(a) to set aside acquisitions for small business concerns does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program.

(c) *Above the simplified acquisition threshold.* For acquisitions of supplies

or services that have an anticipated dollar value exceeding the simplified acquisition threshold definition at 2.101, the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a small business set-aside (see 19.502–2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 CFR parts 124, 125, and 126.

(d) In determining which socioeconomic program to use for an acquisition, the contracting officer should consider, at a minimum—

(1) Results of market research that was done to determine if there are socioeconomic firms capable of satisfying the agency's requirement; and

(2) Agency progress in fulfilling its small business goals.

(e) Small business set-asides have priority over acquisitions using full and open competition. *See* requirements for establishing a small business set-aside at subpart 19.5.

[75 FR 14567, Mar. 16, 2011, as amended at 76 FR 18309, Apr. 1, 2011; 77 FR 12932, Mar. 2, 2012; 80 FR 38298, July 2, 2015; 81 FR 30439, May 16, 2016; 82 FR 4717, Jan. 13, 2017; 85 FR 11759, Feb. 27, 2020; 85 FR 27090, May 6, 2020]

Subpart 19.3—Determination of Small Business Size and Status for Small Business Programs

19.301 Representations and rerepresentations.

19.301–1 Representation by the offeror.

(a) To be eligible for award as a small business concern identified in 19.000(a)(3), an offeror is required to represent in good faith—

(1)(i) That it meets the small business size standard corresponding to the North American Industry Classification System (NAICS) code identified in the solicitation; or

(ii) For a multiple-award contract where there is more than one NAICS code assigned, that it meets the small business size standard for each distinct portion or category (*e.g.*, line item

numbers, Special Item Numbers (SINs), sectors, functional areas, or the equivalent) for which it submits an offer. If the small business concern submits an offer for the entire multiple-award contract, it must meet the size standard for each distinct portion or category (*e.g.*, line item number, SIN, sector, functional area, or equivalent); and

(2) The Small Business Administration (SBA) has not issued a written determination stating otherwise pursuant to 13 CFR 121.1009.

(b) An offeror is required to represent its size and socioeconomic status in writing to the contracting officer at the time of initial offer, including offers for—

(1) Basic ordering agreements (see 16.703); and

(2) Blanket purchase agreements (BPAs) issued pursuant to part 13.

(c) To be eligible for an award of an order under a basic ordering agreement or a BPA issued pursuant to part 13 as a small business concern identified in 19.000(a)(3), the offeror must be a small business concern identified in 19.000(a)(3) at the time of award of the order.

(d) To be eligible for an award under the HUBZone Program (see subpart 19.13), a HUBZone small business concern must be a HUBZone small business concern both at the time of initial offer and at the time of contract award.

(e) Multiple-award contract representations:

(1) A business that represents as a small business concern at the time of its initial offer for the contract is considered a small business concern for each order issued under the contract (but see 19.301–2 for rerepresentations).

(2) A business that represents as a small business concern at the time of its initial offer for a distinct portion or category as set forth in paragraph (a)(1)(ii) is considered a small business concern for each order issued under that distinct portion or category (but see 19.301–2 for rerepresentations).

(f) The contracting officer shall accept an offeror's representation in a specific bid or proposal that it is a small business unless (1) another offeror or interested party challenges the

Federal Acquisition Regulation

19.301-2

concern's small business representation or (2) the contracting officer has a reason to question the representation. Challenges of and questions concerning a specific representation shall be referred to the SBA in accordance with 19.302.

(g) An offeror's representation that it is a small business is not binding on the SBA. If an offeror's small business status is challenged, the SBA will evaluate the status of the concern and make a determination, which will be binding on the contracting officer, as to whether the offeror is a small business. A concern cannot become eligible for a specific award by taking action to meet the definition of a small business concern after the SBA has determined that it is not a small business.

(h) If the SBA determines that the status of a concern as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business has been misrepresented in order to obtain a set-aside contract, an 8(a) subcontract, a subcontract that is to be included as part or all of a goal contained in a subcontracting plan, or a prime or subcontract to be awarded as a result, or in furtherance of any other provision of Federal law that specifically references Section 8(d) of the Small Business Act for a definition of program eligibility, the SBA may take action as specified in Sections 16(a) or 16(d) of the Act. If the SBA declines to take action, the agency may initiate the process. The SBA's regulations on penalties for misrepresentations and false statements are contained in 13 CFR 121.108 for small business, 13 CFR 124.501 for 8(a) small business, 13 CFR 124.1004 for small disadvantaged business, 13 CFR 125.29 for veteran or service-disabled veteran-owned small business, 13 CFR 126.900 for HUBZone small business, and 13 CFR 127.700 for economically disadvantaged women-owned small business concerns and women-

owned small business (WOSB) concerns eligible under the WOSB Program.

[48 FR 42240, Sept. 19, 1983, as amended at 55 FR 3882, Feb. 5, 1990; 60 FR 48261, Sept. 18, 1995; 62 FR 236, Jan. 2, 1997; 63 FR 70268, Dec. 18, 1998; 65 FR 60545, Oct. 11, 2000; 69 FR 25276, May 5, 2004. Redesignated at 72 FR 36855, July 5, 2007; 75 FR 77738, Dec. 13, 2010; 76 FR 18309, Apr. 1, 2011; 85 FR 11759, Feb. 27, 2020]

19.301-2 Rerepresentation by a contractor that represented itself as a small business concern.

(a) *Definition.* As used in this subsection—

Long-term contract means a contract of more than five years in duration, including options. However, the term does not include contracts that exceed five years in duration because the period of performance has been extended for a cumulative period not to exceed six months under the clause at 52.217-8, Option to Extend Services, or other appropriate authority.

(b) A contractor that represented itself as any of the small business concerns identified in 19.000(a)(3) before contract award is required to rerepresent its size and socioeconomic status—

(1) For the NAICS code(s) in the contract—

(i) Within 30 days after execution of a novation agreement or within 30 days after modification of the contract to include the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, if the novation agreement was executed prior to inclusion of this clause in the contract;

(ii) Within 30 days after a merger or acquisition (whether the contractor acquires or is acquired by another company) of the contractor that does not require novation or within 30 days after modification of the contract to include the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, if the merger or acquisition occurred prior to inclusion of this clause in the contract;

(iii) For long-term contracts—

(A) Within 60 to 120 days prior to the end of the fifth year of the contract; and

(B) Within 60 to 120 days prior to the date specified in the contract for exercising any option thereafter; or

(2) For the NAICS code assigned to an order under a multiple-award contract, if the contracting officer requires contractors to rerepresent their size and socioeconomic status for that order.

(c) A contractor is required to rerepresent its size status in accordance with the size standard in effect at the time of its rerepresentation that corresponds to the NAICS code that was initially assigned to the contract. For multiple-award contracts where there is more than one NAICS code assigned, the contractor is required to rerepresent its size status for each NAICS code assigned to the contract.

(d)(1) *Contract rerepresentation.* After a contractor rerepresents for a contract that it no longer qualifies as a small business concern identified in 19.000(a)(3) in accordance with 52.219-28, the agency may no longer include the value of options exercised, modifications issued, orders issued, or purchases made under BPAs on that contract in its small business prime contracting goal achievements. When a contractor's rerepresentation for a contract qualifies it as a different small business concern identified in 19.000(a)(3) than what it represented for award, the agency may include the value of options exercised, modifications issued, orders issued, or purchases made under BPAs on that contract in its small business prime contracting goal achievements, consistent with the rerepresentation. Agencies should issue a modification to the contract capturing the rerepresentation and report it to FPDS within 30 days after notification of the rerepresentation.

(2) *Rerepresentation for a task or delivery order.* (i) When a contractor rerepresents for an order that it no longer qualifies as a small business concern identified in 19.000(a)(3), the agency cannot include the value of the order in its small business prime contracting goal achievements. When a contractor's rerepresentation for an order qualifies it as a different small business concern identified in 19.000(a)(3) than what it represented for contract award, the agency can include the value of the order in its small business

prime contracting goal achievement, consistent with the rerepresentation.

(ii) A rerepresentation for an order does not change the size or socioeconomic status representation for the contract.

(e) A change in size status does not change the terms and conditions of the contract. However, the contracting officer may require a subcontracting plan for a contract containing 52.219-9, Small Business Subcontracting Plan, if a prime contractor's size status changes from small to other than small as a result of a size rerepresentation (see 19.705-2(b)(3)).

[72 FR 36855, July 5, 2007, as amended at 74 FR 11825, Mar. 19, 2009; 81 FR 45843, July 14, 2016; 85 FR 11759, Feb. 27, 2020]

19.301-3 Rerepresentation by a contractor that represented itself as other than a small business concern.

A contractor that represented itself as other than small before contract award may, but is not required to, rerepresent its size status when—

(a) The conditions in 19.301-2(b) apply; and

(b) The contractor qualifies as a small business concern under the applicable size standard in effect at the time of its rerepresentation.

[72 FR 36855, July 5, 2007, as amended at 74 FR 11825, Mar. 19, 2009]

19.302 Protesting a small business representation or rerepresentation.

(a)(1) The SBA regulations on small business size and size protests are found at 13 CFR part 121.

(2) An offeror, the contracting officer, SBA, or another interested party may protest the small business representation of an offeror in a specific offer for a contract. However, for competitive 8(a) contracts, the filing of a protest is limited to an offeror, the contracting officer, or the SBA.

(b) Any time after offers are received by the contracting officer, or in the case of bids, opened, the contracting officer may question the small business representation of any offeror in a specific offer by filing a contracting officer's protest (see paragraph (c) of this section).

(c)(1) Any contracting officer who receives a protest, whether timely or not, or who, as the contracting officer, wishes to protest the small business representation of an offeror, or rerepresentation of a contractor, shall promptly forward the protest to the SBA Government Contracting Area Director at the Government Contracting Area Office serving the area in which the headquarters of the offeror is located.

(2) The protest, or confirmation if the protest was initiated orally, shall be in writing and shall contain the basis for the protest with specific, detailed evidence to support the allegation that the offeror is not small. The SBA will dismiss any protest that does not contain specific grounds for the protest.

(3) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The protest and any accompanying materials.

(ii) A copy of the size self-certification.

(iii) Identification of the applicable size standard.

(iv) A copy or an electronic link to the solicitation and any amendments.

(v) The name, address, telephone number, email address, and fax number of the contracting officer.

(vi) Identification of the bid opening date or the date of notification provided to unsuccessful offerors.

(vii) The date the contracting officer received the protest.

(viii) A complete address and point of contact for the protested concern.

(d) In order to affect a specific solicitation, a protest must be timely. SBA's regulations on timeliness are contained in 13 CFR 121.1004. SBA's regulations on timeliness related to protests of disadvantaged status are contained in 13 CFR 124, Subpart B.

(1) To be timely, a protest by any concern or other interested party must be received by the contracting officer (see (i) and (ii) of this section) by the close of business of the fifth business day after bid opening (in sealed bid acquisitions) or receipt of the special no-

tification from the contracting officer that identifies the apparently successful offeror (in negotiated acquisitions) (see 15.503(a)(2)).

(i) A protest may be made orally if it is confirmed in writing and received by the contracting officer within the 5-day period or by letter postmarked no later than 1 business day after the oral protest.

(ii) A protest may be made in writing if it is delivered to the contracting officer by hand, mail, facsimile, email, express or overnight delivery service.

(2) Except as provided in paragraph (d)(4) of this section, a protest filed by the contracting officer or SBA is always considered timely whether filed before or after award.

(3) A protest under a Multiple Award Schedule will be timely if received by SBA at any time prior to the expiration of the contract period, including renewals.

(4) A protest filed before bid opening, or notification to offerors of the selection of the apparent successful offeror, will be dismissed as premature by SBA.

(e) Upon receipt of a protest from or forwarded by the Contracting Office, the SBA will—

(1) Notify the contracting officer and the protester of the date it was received, and that the size of the concern being challenged is under consideration by the SBA; and

(2) Furnish to the concern whose representation is being protested a copy of the protest and a blank SBA Form 355, Application for Small Business Determination, by certified mail, return receipt requested.

(f)(1) Within 15 business days after receipt of a protest or request for a formal size determination or within any extension of time granted by the contracting officer the SBA Area Office will determine the size status of the challenged concern. The SBA Area Office will notify the contracting officer, the protester, and the challenged concern of its decision by a verifiable means, which may include facsimile, electronic mail, or overnight delivery service.

(2) Award may be made to a protested concern after the SBA Area Office has determined that either the protested

concern is an eligible small business or has dismissed all protests against it.

(3) If SBA's Office of Hearings and Appeals (OHA) subsequently overturns the Area Office's determination of eligibility or dismissal, and contract award has not been made, the contracting officer may apply the OHA decision to the procurement in question.

(g)(1) After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until the SBA has made a size determination or 15 business days have expired since SBA's receipt of a protest, whichever occurs first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

(2) If SBA has not made a determination within 15 business days, or within any extension of time granted by the contracting officer, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.

(3) SBA may, at its sole discretion, reopen a formal size determination to correct an error or mistake, if it is within the appeal period and no appeal has been filed with OHA or, a final decision has not been rendered by the SBA Area Office or OHA.

(4) If a protest is received that challenges the small business status of an offeror not being considered for award, the contracting officer is not required to suspend contract action. The contracting officer shall forward the protest to the SBA (see paragraph (c)(1) of this section) with a notation that the concern is not being considered for award, and shall notify the protester of this action.

(h) An appeal from an SBA size determination may be filed by any concern or other interested party whose protest of the small business representation of another concern has been denied by an SBA Government Contracting Area Director, any concern or other interested party that has been adversely affected by an SBA Government Contracting Area Director's decision, or the SBA

Associate Administrator for the SBA program involved. The appeal must be filed with the Office of Hearings and Appeals, Small Business Administration, Suite 5900, 409 3rd Street, SW., Washington, DC 20416, within the time limits and in strict accordance with the procedures contained in Subpart C of 13 CFR part 134. It is within the discretion of the SBA Judge whether to accept an appeal from a size determination. If a post-award appeal is submitted to OHA within the time limits specified in Subpart C of 13 CFR part 134, the contracting officer shall consider suspending contract performance until an SBA Judge decides the appeal. SBA will inform the contracting officer of its ruling on the appeal. SBA's decision, if received before award, will apply to the pending acquisition. If the contracting officer has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the SBA rulings is received after award, and OHA finds the protested concern to be ineligible for award, the contracting officer shall terminate the contract unless termination is not in the best interests of the Government, in keeping with the circumstances described in the written determination. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(i) SBA will dismiss untimely protests. A protest that is not timely, even though received before award, shall be forwarded to the SBA Government Contracting Area Office (see paragraph (c)(1) of this section), with a notation on it that the protest is not timely. A protest received by a contracting officer after award of a contract shall be forwarded to the SBA Government Contracting Area Office with a notation that award has been made.

(j) When a concern is found to be other than small under a protest concerning a size status rerepresentation made in accordance with the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, a contracting officer may permit contract performance to continue, issue orders,

Federal Acquisition Regulation

19.306

or exercise option(s), because the contract remains a valid contract.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 2664, Jan. 17, 1986; 60 FR 42656, Aug. 16, 1995; 61 FR 69289, Dec. 31, 1996; 62 FR 44820, Aug. 22, 1997; 62 FR 51270, Sept. 30, 1997; 63 FR 9053, 9055, Feb. 23, 1998; 63 FR 35722, June 30, 1998; 64 FR 32743, June 17, 1999; 67 FR 13054, Mar. 20, 2002; 72 FR 36855, July 5, 2007; 79 FR 43582, July 25, 2014; 81 FR 83099, Nov. 18, 2016; 85 FR 11760, Feb. 27, 2020]

19.303 [Reserved]

19.304 Small disadvantaged business status.

(a) The contracting officer may accept an offeror's representation that it is a small disadvantaged business concern (SDB) concern.

(b) The provision at 52.219-1, Small Business Program Representations, or 52.212-3(c)(4), Offeror Representations and Certifications—Commercial Items, is used to collect SDB data.

(c) A representation of SDB status on a Federal prime contract will be deemed a misrepresentation of SDB status if the firm does not meet the requirements of 13 CFR 124.1001(b).

(d) Any person or entity that misrepresents a firm's status as an SDB concern in order to obtain a contracting opportunity in accordance with section 8(d) of the Small Business Act, (15 U.S.C. 637(d)) will be subject to the penalties imposed by section 16(d) of the Small Business Act, (15 U.S.C. 645(d)), as well as any other penalty authorized by law.

[79 FR 61750, Oct. 14, 2014]

19.305 Reviews and protests of SDB status.

This section applies to reviews and protests of a small business concern's SDB status as a prime contractor or subcontractor.

(a) SBA may initiate the review of SDB status on any firm that has represented itself to be an SDB on a prime contract or subcontract to a Federal prime contract whenever it receives credible information calling into question the SDB status of the firm.

(b) Requests for an SBA review of SDB status may be forwarded to the Small Business Administration, Assistant Administrator for SDBCE, 409

Third Street SW., Washington, DC 20416.

(c) An SBA review of a subcontractor's SDB status differs from a formal protest. Protests of a small business concern's SDB status as a subcontractor are processed under 19.703(e). Protests of a concern's size as a prime contractor are processed under 19.302. Protests of a concern's size as a subcontractor are processed under 19.703(b).

[79 FR 61750, Oct. 14, 2014, as amended at 81 FR 45843, July 14, 2016]

19.306 Protesting a firm's status as a HUBZone small business concern.

(a) *Definition.* As used in this section—

Interested party has the meaning given in 13 CFR 126.103.

(b)(1) An offeror that is an interested party, the contracting officer, or the SBA may protest the apparently successful offeror's status as a qualified historically underutilized business zone (HUBZone) small business concern (see 13 CFR 126.800).

(2) SBA's protest regulations are found in subpart H "Protests" at 13 CFR 126.800 through 126.805.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and HUBZone status of an apparent successful offeror shall file two separate protests. Protests relating to small business size status for the acquisition and the HUBZone qualifying requirements will be processed concurrently by SBA.

(d) All protests must be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the status of a concern if the protest presents evidence that—

(i) The concern is not a qualified HUBZone small business concern as described at 13 CFR 126.103 and 13 CFR 126.200;

(ii) The principal office is not located in a HUBZone; or

(iii) At least 35 percent of the employees do not reside in a HUBZone.

(2) Assertions that a protested concern is not a qualified HUBZone small business concern, without setting forth

specific facts or allegations, will not be considered by SBA (see 13 CFR 126.801(b)).

(e) *Protest by an interested party.* (1) An interested party shall submit its protest to the contracting officer—

(i) For sealed bids—

(A) By the close of business on the fifth business day after bid opening; or

(B) By the close of business on the fifth business day from the date of identification of the apparent successful offeror, if the price evaluation preference was not applied at the time of bid opening; or

(ii) For negotiated acquisitions, by the close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror.

(2) Any protest received after the designated time limits is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to the Director, HUBZone Program, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-7167, Attn: HUBZone Small Business Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number (or an electronic link to or a paper copy of the solicitation).

(ii) The name, address, telephone number, fax number, and email address, of the contracting officer.

(iii) The type of HUBZone contract.

(iv) Whether the procurement was conducted using full and open competition with a HUBZone price evaluation preference, and whether the protester's opportunity for award was affected by the preference.

(v) If a HUBZone set-aside, whether the protester submitted an offer.

(vi) Whether the protested concern was the apparent successful offeror.

(vii) Whether the procurement was conducted using sealed bid or negotiated procedures.

(viii) The bid opening date, if applicable. If a price evaluation preference was applied after the bid opening date, also provide the date of identification of the apparent successful offeror.

(ix) The date the contracting officer received the protest.

(x) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as a HUBZone small business concern, the contracting officer shall either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. This determination shall be provided to the SBA's HUBZone Program Director.

(i) *After SBA decision.* The HUBZone Program Director will notify the contracting officer, the protester, and the protested concern of the SBA determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Associate Administrator, Office of Government Contracting and Business Development (AA/GCBD).

(1) If the contracting officer has withheld contract award and SBA has determined that the protested concern is an eligible HUBZone or dismissed all protests against the protested concern, the contracting officer may award the

contract to the protested concern. If AA/GCBD subsequently overturns the decision of the HUBZone Program Director, the contracting officer may apply the AA/GCBD decision to the procurement in question.

(2) If the contracting officer has withheld award and the HUBZone Program Director has determined that the protested concern is ineligible, and a timely AA/GCBD appeal has not been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, and the HUBZone Program Director's ruling sustaining the protest is received after award—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders under the contract;

(ii) The contracting officer shall update the Federal Procurement Data System to reflect the final decision of the HUBZone Program Director if no appeal is filed; and

(iii) The concern's designation as a certified HUBZone small business concern will be removed by SBA from the Dynamic Small Business Database. The concern shall not submit an offer as a HUBZone small business concern, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, SBA has sustained the protest and determined that the concern is not a HUBZone small business, and a timely AA/GCBD appeal has been filed, then the contracting officer shall consider whether performance can be suspended until an AA/GCBD decision is rendered.

(5) If AA/GCBD affirms the decision of the HUBZone Program Director, finding the protested concern is ineligible, and contract award has occurred—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interest of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders.

(ii) The contracting officer shall update the FPDS to reflect the AA/GCBD decision; and

(iii) The SBA will remove the concern's designation as a certified HUBZone small business concern. The concern shall not submit an offer as a HUBZone small business concern until SBA issues a decision that the ineligibility is resolved or AA/GCBD finds the concern is eligible on appeal.

(6) A concern found to be ineligible during a HUBZone status protest is precluded from applying for HUBZone certification for 90 calendar days from the date of the SBA final decision.

(j) *Appeals of HUBZone status determinations.* The protested HUBZone small business concern, the protester, or the contracting officer may file appeals of protest determinations with SBA's AA/GC&BD. The AA/GC&BD must receive the appeal no later than 5 business days after the date of receipt of the protest determination. SBA will dismiss any untimely appeal.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the decision is erroneous or what significant fact the HUBZone Program Director failed to consider.

(l)(1) The party appealing the decision must provide notice of the appeal to—

(i) The contracting officer;

(ii) HUBZone Program Director, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-7167; and

(iii) The protested HUBZone small business concern or the original protester, as appropriate.

(2) SBA will not consider additional information or changed circumstances that were not disclosed at the time of the Director/HUB's decision or that are based on disagreement with the findings and conclusions contained in the determination.

(m) The AA/GCBD will make its decision within 5 business days of the receipt of the appeal, if practicable, and will base its decision only on the information and documentation in the protest record as supplemented by the appeal. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested HUBZone small business concern. The SBA decision, if received before award, will apply to the pending acquisition. The AA/GCBD's decision is the final decision.

[63 FR 70269, Dec. 18, 1998, as amended at 64 FR 51831, Sept. 24, 1999; 75 FR 77729, Dec. 13, 2010; 79 FR 43584, July 25, 2014]

19.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

(a) [Reserved]

(b)(1) For sole source acquisitions, the contracting officer or SBA may protest the apparently successful offeror's service-disabled veteran-owned small business status. For all other acquisitions, any interested party may protest the apparently successful offeror's service-disabled veteran-owned small business status.

(2) SBA's protest regulations are found in subpart D "Protests" at 13 CFR 125.24 through 125.28.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and service-disabled veteran-owned small business status of an apparent successful offeror shall file two separate protests.

(d) All protests must be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the service disabled veteran-owned status or the ownership and control of a concern if—

(i) For status protests, the protester presents evidence supporting the contention that the owner(s) cannot provide documentation from the Department of Veterans Affairs, Department of Defense determinations, or the U.S. National Archives and Records Administration to show that they meet the definition of "service-disabled veteran" or "service disabled veteran with a per-

manent and severe disability" as set forth in 13 CFR 125.8; or

(ii) For ownership and control protests, the protester presents evidence that the concern is not 51 percent owned and controlled by one or more service-disabled veterans. In the case of a veteran with a permanent and severe disability, the protester presents evidence that the concern is not controlled by the veteran, spouse, or permanent caregiver of such veteran.

(2) Assertions that a protested concern is not a service-disabled veteran-owned small business concern, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 125.25(b)).

(e) *Protest by an interested party.* (1) An offeror shall submit its protest to the contracting officer—

(i) To be received by close of business on the fifth business day after bid opening (in sealed bid acquisitions); or

(ii) To be received by close of business on the fifth business day after notification by the contracting officer of the apparently successful offeror for negotiated acquisitions).

(2) Any protest received after the designated time limits is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to SBA's Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-6390, Attn: Service-Disabled Veteran Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number (or an electronic link to or a paper copy of the solicitation).

(ii) The name, address, telephone number, fax number, and email address of the contracting officer.

(iii) Whether the contract was sole-source or set-aside.

(iv) Whether the protestor submitted an offer.

(v) Whether the protested concern was the apparent successful offeror.

(vi) When the protested concern submitted its offer.

(vii) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(viii) The bid opening date, if applicable.

(ix) The date the contracting officer received the protest.

(x) The date the protestor received notification about the apparent successful offeror, if applicable.

(xi) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as a service-disabled veteran-owned small business concern, the contracting officer shall either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time that is granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the government. This determination shall be provided to the SBA's Director, Office of Government Contracting and a copy shall be included in the contract file.

(i) *After SBA decision.* SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless overturned on appeal by SBA's Office

of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(1) If the contracting officer has withheld contract award and SBA has determined that the protested concern is an eligible SDVOSB or dismissed all protests against the protested concern, the contracting officer may award the contract to the protested concern. If OHA subsequently overturns the SBA Director for Government Contracting's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) If the contracting officer has withheld contract award, SBA has sustained the protest and determined that the concern is not an SDVOSB, and no OHA appeal has been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, the contract has been awarded, and SBA's ruling sustaining the protest is received after award—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect the final SBA decision; and

(iii) The concern must remove its designation in the System for Award Management (SAM) as a SDVOSB concern, and shall not submit an offer as a SDVOSB concern, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section and awarded the contract to the protested firm, SBA has sustained the protest and determined that the concern is not a SDVOSB, and a timely OHA appeal has been filed, then the contracting officer shall consider whether performance can be suspended until an OHA decision is rendered.

(5) If OHA affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible—

(i) The contracting officer shall terminate the contract unless the contracting officer has made a written determination that it is not in the best interest of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect OHA's decision; and

(iii) The concern shall remove its designation in SAM as a SDVOSB concern, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

(6) A concern found to be ineligible may not submit future offers as an SDVOSB concern until the concern demonstrates to SBA's satisfaction that it has overcome the reason for the protest and SBA issues a decision to this effect.

(j) *Appeals of SDVOSB status determinations.* The protested SDVOSB small business concern, the protester, or the contracting officer may file appeals of protest determinations to OHA. OHA must receive the appeal no later than 10 business days after the date of receipt of the protest determination. SBA will dismiss an untimely appeal. See Subpart E "Rules of Practice for Appeals From Service-Disabled Veteran Owned Small Business Concerns Protests" at 13 CFR 134.501 through 134.515 for SBA's appeals regulations.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the SDVOSB protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation.

(l) The party appealing the decision must provide notice of the appeal to—

(1) The contracting officer;

(2) Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6390;

(3) The protested SDVOSB concern or the original protester, as appropriate; and

(4) Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6873, or email at OPLService@sba.gov.

(m) OHA will make its decision within 15 business days of the receipt of the appeal, if practicable. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested SDVOSB small business concern. The OHA decision regarding the status of the concern is final and is binding on the parties.

[79 FR 43586, July 25, 2014, as amended at 79 FR 46375, Aug. 8, 2014; 85 FR 11760, Feb. 27, 2020]

19.308 Protesting a firm's status as an economically disadvantaged women-owned small business concern or women-owned small business concern eligible under the Women-Owned Small Business Program.

(a) *Definition.* Interested party, as used in this section, has the meaning given in 13 CFR 127.102.

(b)(1) For sole source acquisitions, the contracting officer or SBA may protest the offeror's status as an economically disadvantaged women-owned small business (EDWOSB) concern or as a WOSB concern eligible under the WOSB Program. For all other acquisitions, an interested party (see 13 CFR 127.102) may protest the apparent successful offeror's EDWOSB or WOSB status.

(2) SBA's protest regulations are found in subpart F "Protests" at 13 CFR 127.600 through 127.605.

(c) Protests relating to small business size status are subject to the procedures of 19.302. An interested party seeking to protest both the small business size and WOSB or EDWOSB status of an apparent successful offeror shall file two separate protests.

(d) All protests shall be in writing and must state all specific grounds for the protest.

(1) SBA will consider protests challenging the status of a concern if—

(i) The protest presents evidence that the concern is not at least 51 percent

owned and controlled by one or more women who are United States citizens; or

(ii) The protest presents evidence that the concern is not at least 51 percent owned and controlled by one or more economically disadvantaged women, when it is in connection with an EDWOSB contract.

(2) SBA shall consider protests by a contracting officer when the apparent successful offeror has failed to provide all of the required documents, as set forth in 19.1503(c).

(3) Assertions that a protested concern is not a EDWOSB or WOSB concern eligible under the WOSB Program, without setting forth specific facts or allegations, will not be considered by SBA (see 13 CFR 127.603(a)).

(e) *Protest by an interested party.* (1) An offeror shall submit its protest to the contracting officer—

(i) To be received by the close of business by the fifth business day after bid opening (in sealed bid acquisitions); or

(ii) To be received by the close of business by the fifth business day after notification by the contracting officer of the apparent successful offeror (in negotiated acquisitions).

(2) Any protest received after the designated time limit is untimely, unless it is from the contracting officer or SBA.

(f)(1) The contracting officer shall forward all protests to SBA. The protests are to be submitted to SBA's Director for Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416 or by fax to 202-205-6390, Attn: Women-owned Small Business Status Protest.

(2) The protest shall include a referral letter written by the contracting officer with information pertaining to the solicitation. The referral letter must include the following information to allow SBA to determine timeliness and standing:

(i) The solicitation number or electronic link to or a paper copy of the solicitation.

(ii) The name, address, telephone number, email address, and facsimile number of the contracting officer.

(iii) Whether the protestor submitted an offer.

(iv) Whether the protested concern was the apparent successful offeror.

(v) When the protested concern submitted its offer.

(vi) Whether the acquisition was conducted using sealed bid or negotiated procedures.

(vii) The bid opening date, if applicable.

(viii) The date the contracting officer received the protest.

(ix) The date the protestor received notification about the apparent successful offeror, if applicable.

(x) Whether a contract has been awarded.

(g) SBA will notify the protester and the contracting officer of the date SBA received the protest.

(h) *Before SBA decision.* (1) After receiving a protest involving the apparent successful offeror's status as an EDWOSB or WOSB concern eligible under the WOSB Program, the contracting officer shall either—

(i) Withhold award of the contract until SBA determines the status of the protested concern; or

(ii) Award the contract after receipt of the protest but before SBA issues its decision if the contracting officer determines in writing that an award must be made to protect the public interest.

(2) SBA will determine the merits of the status protest within 15 business days after receipt of a protest, or within any extension of that time granted by the contracting officer.

(3) If SBA does not issue its determination within 15 business days, or within any extension of time granted, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government. This determination shall be provided to the SBA Director for Government Contracting and a copy shall be included in the contract file.

(i) *After SBA decision.* SBA will notify the contracting officer, the protester, and the protested concern of its determination. The determination is effective immediately and is final unless

overturned on appeal by SBA's Office of Hearings and Appeals (OHA) pursuant to 13 CFR part 134.

(1) If the contracting officer has withheld contract award and SBA has denied or dismissed the protest, the contracting officer may award the contract to the protested concern. If OHA subsequently overturns the SBA Director for Government Contracting's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) If the contracting officer has withheld contract award, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and no OHA appeal has been filed, then the contracting officer shall not award the contract to the protested concern.

(3) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, awarded the contract, and SBA's ruling is received after award, and no OHA appeal has been filed, then—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect the final SBA decision; and

(iii) The concern must remove its designation in SAM as an EDWOSB or WOSB concern eligible under the WOSB Program, and shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved.

(4) If the contracting officer has made a written determination in accordance with (h)(1)(ii) or (h)(3) of this section, contract award has occurred, SBA has sustained the protest and determined that the concern is not eligible under the WOSB Program, and a timely OHA appeal has been filed, then the contracting officer shall consider whether performance can be suspended until an OHA decision is rendered.

(5) If OHA affirms the SBA Director for Government Contracting's determination finding the protested concern is ineligible, then—

(i) The contracting officer shall terminate the contract, unless the contracting officer has made a written determination that termination is not in the best interests of the Government. However, the contracting officer shall not exercise any options or award further task or delivery orders;

(ii) The contracting officer shall update the FPDS to reflect OHA's decision; and

(iii) The concern must remove its designation in SAM as an EDWOSB or WOSB concern eligible under the WOSB Program, and shall not submit an offer as an EDWOSB concern or WOSB concern eligible under the WOSB Program, until SBA issues a decision that the ineligibility is resolved or OHA finds the concern is eligible on appeal.

(j) *Appeals of EDWOSB or WOSB concerns eligible under the WOSB Program status determinations.* (1) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, the protester, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with OHA.

(2) OHA must receive the appeal no later than 10 business days after the date of receipt of the protest determination. SBA will dismiss an untimely appeal.

(3) See subpart G "Rules of Practice for Appeals From Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests" at 13 CFR 134.701 through 134.715 for SBA's appeals regulations.

(k) *The appeal must be in writing.* The appeal must identify the protest determination being appealed and must set forth a full and specific statement as to why the EDWOSB concern or WOSB concern eligible under the WOSB program protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation.

(l) The party appealing the decision must provide notice of the appeal to—

(1) The contracting officer;

(2) Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6390;

(3) The protested EDWOSB concern or WOSB concern eligible under the WOSB program, or the original protester, as appropriate; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416, facsimile 202-205-6873, or email at *OPLService@sba.gov*.

(m) OHA will make its decision within 15 business days of the receipt of the appeal, if practicable. SBA will provide a copy of the decision to the contracting officer, the protester, and the protested EDWOSB concern or WOSB concern eligible under the WOSB program. The OHA decision is the final agency decision and is binding on the parties.

[79 FR 43587, July 25, 2014, as amended at 80 FR 81891, Dec. 31, 2015; 83 FR 48697, Sept. 26, 2018]

19.309 Solicitation provisions and contract clauses.

(a)(1) Insert the provision at 52.219-1, Small Business Program Representations, in solicitations exceeding the micro-purchase threshold when the contract will be performed in the United States or its outlying areas.

(2) Use the provision with its Alternate I in solicitations issued by DoD, NASA, or the Coast Guard.

(3) Use the provision with its Alternate II in solicitations that will result in a multiple-award contract with more than one NAICS code assigned. This is authorized for solicitations issued after October 1, 2022 (see 19.102(b)).

(b) When contracting by sealed bidding, insert the provision at 52.219-2, Equal Low Bids, in solicitations when the contract will be performed in the United States or its outlying areas.

(c)(1) Insert the clause at 52.219-28, Post-Award Small Business Program Rerepresentation, in solicitations and contracts exceeding the micro-purchase threshold when the contract will be performed in the United States or its outlying areas.

(2) Use the clause with its Alternate I in solicitations and the resulting multiple-award contracts with more than one NAICS code. This is authorized for solicitations issued after October 1, 2022 (see 19.102(b)).

[64 FR 51832, Sept. 24, 1999, as amended at 67 FR 13066, Mar. 20, 2002; 68 FR 28081, May 22, 2003. Redesignated at 69 FR 25277, May 5, 2004, as amended at 72 FR 36855, July 5, 2007. Redesignated at 76 FR 18309, Apr. 1, 2011; 79 FR 61750, Oct. 14, 2014; 85 FR 11760, Feb. 27, 2020]

Subpart 19.4—Cooperation With the Small Business Administration

19.401 General.

(a) The Small Business Act is the authority under which the Small Business Administration (SBA) and agencies consult and cooperate with each other in formulating policies to ensure that small business interests will be recognized and protected.

(b) The Director of the Office of Small and Disadvantaged Business Utilization serves as the agency focal point for interfacing with SBA. The Director of the Office of Small Business Programs is the agency focal point for the Department of Defense.

[48 FR 42240, Sept. 19, 1983, as amended at 60 FR 48261, Sept. 18, 1995; 85 FR 11760, Feb. 27, 2020]

19.402 Small Business Administration procurement center representatives.

(a)(1) The SBA may assign one or more procurement center representatives (PCRs) to any contracting activity or contract administration office to carry out SBA policies and programs. Assigned SBA PCRs are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its PCRs security clearances required by the contracting agency.

(2) If an SBA PCR is not assigned to the procuring activity or contract administration office, contact the SBA Office of Government Contracting Area Office serving the area in which the procuring activity is located for assistance in carrying out SBA policies and

programs. See <https://www.sba.gov/federal-contracting/counseling-help/procurement-center-representative-directory> for the location of the SBA office servicing the activity.

(b) Upon their request and subject to applicable acquisition and security regulations, contracting officers shall give SBA PCRs (or, if a PCR is not assigned, see paragraph (a) of this section) access to all reasonably obtainable contract information that is directly pertinent to their official duties.

(c) The duties assigned by SBA to its PCR are set forth at 13 CFR 125.2(b) and include but are not limited to the following:

(1) Reviewing proposed acquisitions to recommend—

(i) The setting aside of selected acquisitions not unilaterally set aside by the contracting officer;

(ii) New qualified small business sources, including veteran-owned small, service-disabled veteran-owned small, HUBZone small, small disadvantaged, economically disadvantaged women-owned small, and women-owned small eligible under the Women-Owned Small Business Program; and

(iii) Breakout of components for competitive acquisitions.

(2) Reviewing proposed acquisition packages provided in accordance with 19.202–1(e). If the SBA procurement center representative (or, if a procurement center representative is not assigned, see paragraph (a) of this section) believes that the acquisition, as proposed, makes it unlikely that small businesses can compete for the prime contract, the representative shall recommend any alternate contracting method that the representative reasonably believes will increase small business prime contracting opportunities. The recommendation shall be made to the contracting officer within 15 days after receipt of the package.

(3) Recommending concerns for inclusion on a list of concerns to be solicited in a specific acquisition.

(4) Appealing to the chief of the contracting office any contracting officer's determination not to solicit a concern recommended by the SBA for a particular acquisition, when not doing so results in no small business being solicited.

(5) Conducting periodic reviews of the contracting activity to which assigned to ascertain whether it is complying with the small business policies in this regulation.

(6) Sponsoring and participating in conferences and training designed to increase small business participation in the contracting activities of the office.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 19715, May 30, 1986; 56 FR 67132, Dec. 27, 1991; 60 FR 48261, Sept. 18, 1995; 63 FR 70269, Dec. 18, 1998; 65 FR 60545, Oct. 11, 2000; 68 FR 43856, July 24, 2003; 71 FR 36925, June 28, 2006; 76 FR 18310, Apr. 1, 2011; 77 FR 204, Jan. 3, 2012; 79 FR 43588, July 25, 2014; 85 FR 11760, Feb. 27, 2020]

19.403 Small Business Administration breakout procurement center representatives.

(a) The SBA is required by section 403 of Pub. L. 98–577 to assign a breakout procurement center representative to each major procurement center. A major procurement center means a procurement center that, in the opinion of the administrator, purchases substantial dollar amounts of other than commercial items, and which has the potential to incur significant savings as a result of the placement of a breakout procurement representative. The SBA breakout procurement center representative is an advocate for (1) the appropriate use of full and open competition, and (2) the breakout of items, when appropriate and while maintaining the integrity of the system in which such items are used. The SBA breakout procurement center representative is in addition to the SBA procurement center representative (see 19.402). When an SBA breakout procurement center representative is assigned, the SBA is required to assign at least two collocated small business technical advisors. Assigned SBA breakout procurement center representatives and technical advisors are required to comply with the contracting agency's directives governing the conduct of contracting personnel and the release of contract information. The SBA must obtain for its breakout procurement center representatives and technical advisors security clearances required by the contracting agency.

(b) Contracting officers shall comply with 19.402(b) in their relationships with SBA breakout procurement center representatives and SBA small business technical advisors.

(c) The SBA breakout procurement center representative is authorized to—

(1) Attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be acquired using other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(2) Review, at any time, restrictions on competition previously imposed on items through acquisition method coding or similar procedures and recommend to personnel of the appropriate activity the prompt reevaluation of such limitations;

(3) Review restrictions on competition arising out of restrictions on the rights of the United States in technical data and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(4) Obtain from any governmental source, and make available to personnel of the appropriate center, technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously acquired noncompetitively due to the unavailability of such technical data;

(5) Have access to procurement records and other data of the procurement center commensurate with the level of such representative's approved security clearance classification;

(6) Receive unsolicited engineering proposals and, when appropriate—

(i) Conduct a value analysis of such proposal to determine whether it, if adopted, will result in lower costs to the United States without substantially impeding legitimate acquisition objectives and forward to personnel of the appropriate center recommendations with respect to such proposal; or

(ii) Forward such proposals without analysis to personnel of the center responsible for reviewing them who shall furnish the breakout procurement cen-

ter representative with information regarding the proposal's disposition;

(7) Review the systems that account for the acquisition and management of technical data within the procurement center to ensure that such systems provide the maximum availability and access to data needed for the preparation of offers to sell to the United States those supplies to which such data pertain which potential offerors are entitled to receive;

(8) Appeal the failure by the procurement center to act favorably on any recommendation made pursuant to subparagraphs (c) (1) through (7) of this section. Such appeal must be in writing and shall be filed and processed in accordance with the appeal procedures set out in 19.502-8;

(9) Conduct familiarization sessions for contracting officers and other appropriate personnel of the procurement center to which assigned. Such sessions shall acquaint the participants with the duties and objectives of the representative and shall instruct them in the methods designed to further the breakout of items for procurement through full and open competition; and

(10) Prepare and personally deliver an annual briefing and report to the head of the procurement center to which assigned. Such briefing and report shall detail the past and planned activities of the representative and shall contain recommendations for improvement in the operation of the center as may be appropriate. The head of such center shall personally receive the briefing and report and shall, within 60 calendar days after receipt, respond, in writing, to each recommendation made by the representative.

(d) The duties of the SBA small business technical advisors are to assist the SBA breakout procurement center representative in carrying out the activities described in (c) (1) through (7) of this section and to assist the SBA procurement center representatives (see FAR 19.402).

[51 FR 19715, May 30, 1986, as amended at 54 FR 25062, June 12, 1989; 85 FR 11760, Feb. 27, 2020]

Subpart 19.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

19.501 General.

(a)(1) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A “set-aside for small business” is the limiting of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to any of the small business concerns identified at 19.000(a)(3). A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

(2) The purpose of small business reserves is to award one or more multiple-award contracts to any of the small business concerns identified at 19.000(a)(3), under a full and open competition. A small business reserve shall not be used when the acquisition can be set aside, in total or in part.

(b) The contracting officer makes the determination to make a small business set-aside, in total or in part, or a reserve. The Small Business Administration (SBA) procurement center representative (PCR) (or, if a PCR is not assigned, see 19.402(a)) may make a recommendation to the contracting officer.

(c) The contracting officer shall review acquisitions to determine if they can be set aside, in total or in part, or reserved for small business, giving consideration to the recommendations of agency personnel in the Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, in the Office of Small Business Programs. Agencies may establish threshold levels for this review depending upon their needs.

(d) At the request of an SBA PCR (or, if a PCR is not assigned, see 19.402(a)), the contracting officer shall make available for review at the contracting office (to the extent of the SBA representative’s security clearance) all proposed acquisitions in excess of the micro-purchase threshold that have not been unilaterally set aside for small business.

(e) All solicitations involving set-asides, in total or in part, or reserves shall specify the NAICS code(s) and

corresponding size standard(s) (see 19.102).

(f) Except as authorized by law, a contract may not be awarded as a result of a small business set-aside if the cost to the awarding agency exceeds the fair market price.

(g) For the applicability of the limitations on subcontracting and the non-manufacturer rule, see 19.505.

[85 FR 11760, Feb. 27, 2020]

19.502 Setting aside acquisitions.

19.502–1 Requirements for setting aside acquisitions.

(a) The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when—

(1) It is determined to be in the interest of maintaining or mobilizing the Nation’s full productive capacity, war or national defense programs; or

(2) Assuring that a fair proportion of Government contracts in each industry is placed with small business concerns; and the circumstances described in 19.502–2 or 19.502–3(a) exist.

(b) The requirement in paragraph (a) of this section does not apply to purchases at or below the micro-purchase threshold, or purchases from required sources under part 8 (*e.g.*, Committee for Purchase From People Who are Blind or Severely Disabled).

[63 FR 70270, Dec. 18, 1998, as amended at 67 FR 56121, Aug. 30, 2002; 68 FR 4050, Jan. 27, 2003; 69 FR 8314, Feb. 23, 2004; 69 FR 16150, Mar. 26, 2004; 71 FR 57367, Sept. 28, 2006; 80 FR 38298, July 2, 2015; 85 FR 11761, Feb. 27, 2020; 85 FR 27090, May 6, 2020]

19.502–2 Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). Each acquisition of supplies or services that has an anticipated dollar value above the micro-purchase threshold, but not over the simplified acquisition threshold, shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of fair market prices,

Federal Acquisition Regulation

19.502-4

quality, and delivery. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. The small business set-aside does not preclude the award of a contract as described in 19.203.

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). The contracting officer shall set aside any acquisition over the simplified acquisition threshold for small business participation when there is a reasonable expectation that—

(1) Offers will be obtained from at least two responsible small business concerns; and

(2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 for partial set-asides). Although past acquisition history and market research of an item or similar items are always important, these are not the only factors to be considered in determining whether a reasonable expectation exists. In making research and development small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

[60 FR 34757, July 3, 1995]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.502-2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.502-3 Partial set-asides of contracts other than multiple-award contracts.

(a) The contracting officer shall set aside a portion or portions of an acquisition, except for construction, for exclusive small business participation when—

(1) Market research indicates that a total set-aside is not appropriate (see 19.502-2);

(2) The requirement can be divided into distinct portions;

(3) The acquisition is not subject to simplified acquisition procedures;

(4) Two or more responsible small business concerns are reasonably expected to submit offers on the set-aside portion or portions of the acquisition that are competitive in terms of fair market prices, quality, and delivery;

(5) The specific program eligibility requirements identified in this part apply; and

(6) The solicitation will result in a contract other than a multiple-award contract (see 2.101 for definition of multiple-award contract).

(b) When the contracting officer determines that a requirement is to be partially set aside, the solicitation shall identify which portion or portions are set aside and not set aside.

(c) The contracting officer shall specify in the solicitation how offers shall be submitted with regard to the set-aside and non-set-aside portions.

(d) Offers received from concerns that do not qualify as small business concerns shall be considered non-responsive and shall be rejected on the set-aside portion of partial set-asides. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

[85 FR 11761, Feb. 27, 2020]

19.502-4 Partial set-asides of multiple-award contracts.

(a) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(1)), contracting officers may, at their discretion, set aside a portion or portions of a multiple-award contract, except for construction, for any of the small business concerns identified at 19.000(a)(3) when—

(1) Market research indicates that a total set-aside is not appropriate (see 19.502-2);

(2) The requirement can be divided into distinct portions;

(3) The acquisition is not subject to simplified acquisition procedures;

19.502-5

(4) Two or more responsible small business concerns are reasonably expected to submit an offer on the set-aside portion or portions of the acquisition that are competitive in terms of fair market prices, quality, and delivery; and

(5) The specific program eligibility requirements identified in this part apply.

(b) When the contracting officer determines that a requirement is to be partially set aside, the solicitation shall identify which portion or portions are set aside and not set aside.

(c) The contracting officer shall specify in the solicitation how offers shall be submitted with regard to the set-aside and non-set-aside portions.

(d) Offers received from concerns that do not qualify as small business concerns shall be considered non-responsive and shall be rejected on the set-aside portion of partial set-asides. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

[85 FR 11761, Feb. 27, 2020]

19.502-5 Insufficient reasons for not setting aside an acquisition.

None of the following is, in itself, sufficient cause for not setting aside an acquisition:

(a) A large percentage of previous contracts for the required item(s) has been placed with small business concerns.

(b) The item is on an established planning list under the Industrial Readiness Planning Program. However, a total small business set-aside shall not be made when the list contains a large business Planned Emergency Producer of the item(s) who has conveyed a desire to supply some or all of the required items.

(c) The item is on a Qualified Products List. However, a total small business set-aside shall not be made if the list contains the products of large business unless none of the large businesses desires to participate in the acquisition.

(d) A period of less than 30 days is available for receipt of offers.

(e) The acquisition is classified.

48 CFR Ch. 1 (10-1-20 Edition)

(f) Small business concerns are already receiving a fair proportion of the agency's contracts for supplies and services.

(g) A class small business set-aside of the item or service has been made by another contracting activity.

(h) A "brand name or equal" product description will be used in the solicitation.

[48 FR 42240, Sept. 19, 1989, as amended at 63 FR 70270, 70292, Dec. 18, 1998. Redesignated at 76 FR 68035, Nov. 2, 2011. Redesignated and amended at 85 FR 11762, Feb. 27, 2020]

19.502-6 Setting aside a class of acquisitions for small business.

(a) A class of acquisitions of selected products or services, or a portion of the acquisitions, may be set aside for exclusive participation by small business concerns if individual acquisitions in the class will meet the criteria in 19.502-1, 19.502-2, or 19.502-3(a). The determination to make a class small business set-aside shall not depend on the existence of a current acquisition if future acquisitions can be clearly foreseen.

(b) The determination to set aside a class of acquisitions for small business may be either unilateral or joint.

(c) Each class small business set-aside determination shall be in writing and must—

(1) Specifically identify the product(s) and service(s) it covers;

(2) Provide that the set aside does not apply to any acquisition automatically under 19.502-2(a).

(3) Provide that the set-aside applies only to the (named) contracting office(s) making the determination; and

(4) Provide that the set-aside does not apply to any individual acquisition if the requirement is not severable into two or more economic production runs or reasonable lots, in the case of a partial class set-aside.

(d) The contracting officer shall review each individual acquisition arising under a class small business set-aside to identify any changes in the magnitude of requirements, specifications, delivery requirements, or competitive market conditions that have occurred since the initial approval of the class small business set-aside. If

Federal Acquisition Regulation

19.502-9

there are any changes of such a material nature as to result in probable payment of more than a fair market price by the Government or in a change in the capability of small business concerns to satisfy the requirements, the contracting officer may withdraw or modify (see 19.502-9(a)) the unilateral or joint set-aside by giving written notice to the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) stating the reasons.

[48 FR 42240, Sept. 19, 1989, as amended at 53 FR 43390, Oct. 26, 1988; 60 FR 34757, July 3, 1995; 63 FR 70270, Dec. 18, 1998; 71 FR 36926, June 28, 2006. Redesignated and amended at 85 FR 11762, Feb. 27, 2020]

19.502-7 Inclusion of Federal Prison Industries, Inc.

When using competitive procedures in accordance with 8.602(a)(4), agencies shall include Federal Prison Industries, Inc. (FPI), in the solicitation process and consider a timely offer from FPI.

[69 FR 16150, Mar. 26, 2004, as amended at 71 FR 223, Jan. 3, 2006. Redesignated at 85 FR 11762, Feb. 27, 2020]

19.502-8 Rejecting Small Business Administration recommendations.

(a) If the contracting officer rejects a recommendation of the SBA, written notice shall be furnished to the appropriate SBA representative within 5 working days of the contracting officer's receipt of the recommendation.

(b) The SBA PCR (or, if a PCR is not assigned, see 19.402(a)) may appeal the contracting officer's rejection to the head of the contracting activity within 2 working days after receiving the notice. The head of the contracting activity shall render a decision in writing, and provide it to the SBA representative within 7 working days. Pending issuance of a decision to the SBA representative, the contracting officer shall suspend action on the acquisition.

(c) If the head of the contracting activity agrees that the contracting officer's rejection was appropriate—

(1) Within 2 working days, the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) may request the contracting officer to suspend action on the acquisition until the SBA Administrator appeals to the

agency head (see paragraph (f) of this section); and

(2) The SBA must be allowed 15 working days after making such a written request, within which the Administrator of SBA—

(i) May appeal to the Secretary of the Department concerned; and

(ii) Must notify the contracting officer whether the further appeal has, in fact, been taken. If notification is not received by the contracting officer within the 15-day period, it is deemed that the SBA request to suspend the contract action has been withdrawn and that an appeal to the Secretary was not taken.

(d) When the contracting officer has been notified within the 15-day period that the SBA has appealed to the agency head, the head of the contracting activity (or designee) shall forward justification for its decision to the agency head. The contracting officer shall suspend contract action until notification is received that the SBA appeal has been settled.

(e) The agency head shall reply to the SBA within 30 working days after receiving the appeal. The decision of the agency head shall be final.

(f) A request to suspend action on an acquisition need not be honored if the contracting officer determines that proceeding to contract award and performance is in the public interest. The contracting officer shall include in the contract file a statement of the facts justifying the determination, and shall promptly notify the SBA representative of the determination and provide a copy of the justification.

[60 FR 48261, Sept. 18, 1995, as amended at 67 FR 13054, Mar. 20, 2002; 71 FR 36926, June 28, 2006. Redesignated and amended at 85 FR 11762, Feb. 27, 2020]

19.502-9 Withdrawing or modifying small business set-asides.

(a) If, before award of a contract involving a total or partial small business set-aside, the contracting officer considers that award would be detrimental to the public interest (e.g., payment of more than a fair market price), the contracting officer may withdraw the small business set-aside, whether it

was unilateral or joint. The contracting officer shall initiate a withdrawal of an individual total or partial small business set-aside, by giving written notice to the agency small business specialist and the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) stating the reasons. In a similar manner, the contracting officer may modify a unilateral or joint class small business set-aside to withdraw one or more individual acquisitions.

(b) If the agency small business specialist does not agree to a withdrawal or modification, the case shall be promptly referred to the SBA PCR (or, if a PCR is not assigned, see 19.402(a)) for review.

(c) The contracting officer shall prepare a written statement supporting any withdrawal or modification of a small business set-aside and include it in the contract file.

[60 FR 48262, Sept. 18, 1995, as amended at 63 FR 70270, Dec. 18, 1998; 71 FR 36926, June 28, 2006. Redesignated and amended at 85 FR 11762, Feb. 27, 2020]

19.502-10 Automatic dissolution of a small business set-aside.

(a) If a small business set-aside acquisition or portion of an acquisition is not awarded, the unilateral or joint determination to set the acquisition aside is automatically dissolved for the unawarded portion of the set-aside. The required supplies and/or services for which no award was made may be acquired by sealed bidding or negotiation, as appropriate.

(b) Before issuing a solicitation for the items called for in a small business set-aside that was dissolved, the contracting officer shall ensure that the delivery schedule is realistic in the light of all relevant factors, including the capabilities of small business concerns.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 63 FR 70270, Dec. 18, 1998. Redesignated at 85 FR 11762, Feb. 27, 2020]

19.503 Reserves.

(a) In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(3)) and 13 CFR 125.2(e)(4), contracting officers may, at their discretion when conducting multiple-

award procurements using full and open competition, reserve one or more contract awards for any of the small business concerns identified in 19.000(a)(3), when market research indicates—

(1) A total set-aside is not feasible because there is no reasonable expectation of receiving offers that are competitive in terms of fair market prices, quality, and delivery from at least two responsible small business concerns identified in 19.000(a)(3), that can perform the entire requirement; and

(2) A partial set-aside is not feasible because—

(i) The contracting officer is unable to divide the requirement into distinct portions; or

(ii) There is no reasonable expectation that at least two responsible small business concerns identified in 19.000(a)(3) can perform any portion of the requirement competitively in terms of fair market price, quality, and delivery.

(b) A reserve will result in one of the following:

(1) One or more contract awards to any one or more types of small business concerns identified in 19.000(a)(3).

(2) In the case of a solicitation of a bundled requirement that will result in a multiple-award contract, an award to one or more small businesses with a Small Business Teaming Arrangement.

(c) The specific program eligibility requirements identified in this part apply.

(d) The limitations on subcontracting and the nonmanufacturer rule (see 19.505) do not apply to reserves at the contract level, but shall apply to orders that are set aside or issued directly to one small business concern under 19.504(c)(1)(ii).

[85 FR 11762, Feb. 27, 2020]

19.504 Orders under multiple-award contracts.

(a) *General.* In accordance with section 1331 of the Small Business Jobs Act of 2010 (15 U.S.C. 644(r)(2)), contracting officers may, at their discretion, set aside orders placed under multiple-award contracts for any of the small business concerns identified in 19.000(a)(3).

Federal Acquisition Regulation

19.505

(1) The contracting officer shall state in the solicitation and resulting contract whether order set-asides will be discretionary or mandatory when the conditions in 19.502-2 are met at the time of order set-aside, and the specific program eligibility requirements, as applicable, are also then met.

(2) When setting aside an order at or below the simplified acquisition threshold, the contracting officer may set aside the order for any of the small business concerns identified in 19.000(a)(3).

(3) When setting aside an order above the simplified acquisition threshold, the contracting officer shall first consider setting aside the order for the small business socioeconomic contracting programs (*i.e.*, 8(a), HUBZone, service-disabled veteran-owned small business, and women-owned small business) before considering a small business set-aside.

(4) The contracting officer shall comply with the specific program eligibility requirements identified in this part in addition to the ordering procedures for a multiple-award contract (for orders placed under the Federal Supply Schedules Program, see 8.405-5; for orders placed under all other multiple-award contracts, see 16.505).

(b) *Orders under partial set-aside contracts.* (1) Only small business concerns awarded contracts for the portion(s) that were set aside under the solicitation for the multiple-award contract may compete for orders issued under those portion(s).

(2) Small business awardees may compete against other than small business awardees for an order issued under the portion of the multiple-award contract that was not set aside, if the small business received a contract award for the non-set-aside portion.

(c) *Orders under reserves.* (1) The contracting officer may—

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3) when there are two or more contract awards for that type of small business concern; or

(ii) Issue orders directly to one small business concern for work that it can perform when there is only one contract award to any one type of small

business concern identified in 19.000(a)(3).

(2) Small business awardees may compete against other than small business awardees for an order that is not set aside if the small business received a contract award for the supplies or services being ordered.

[85 FR 11762, Feb. 27, 2020]

19.505 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a set-aside contract, an order under a set-aside, or an order in accordance with 19.504(c)(1)(ii), the small business concern is required to perform as follows:

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees.

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials).

(3) For general construction, at least 15 percent of the cost (not including the cost of materials) with its own employees.

(4) For construction by special trade contractors, at least 25 percent of the cost (not including the cost of materials) with its own employees.

(b) *Compliance period.* A small business contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside, either by the end of the base term and then by the end of each subsequent option period, or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside under a contract as described in 19.504(a), (b), or (c)(1)(i) or an order issued in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* (1) To be awarded a set-aside contract or order, or an order issued in accordance with 19.504(c)(1)(ii), for supplies as a nonmanufacturer, a contractor is required to—

(i) Provide the end item of a small business manufacturer, that has been

manufactured or produced in the United States or its outlying areas (but see 19.1308(e)(1)(i) for contracts and orders awarded under the HUBZone Program);

(ii) Not exceed 500 employees;

(iii) Be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) Take ownership or possession of the item(s) with its personnel, equipment or facilities in a manner consistent with industry practice.

(2) In addition to the requirements set forth in (c)(1) of this section, when the end item being acquired is a kit of supplies or other goods, 50 percent of the total value of the components of the kit shall be manufactured in the United States or its outlying areas by small business concerns. Where the Government has specified an item for the kit which is not produced by U.S. small business concerns, such items shall be excluded from the 50 percent calculation. See 13 CFR 121.406(c) for further information regarding non-manufacturer kit assemblers.

(3) For size determination purposes, there can be only one manufacturer of the end product being acquired. For the purposes of the nonmanufacturer rule, the manufacturer of the end product being acquired is the concern that transforms raw materials and/or miscellaneous parts or components into the end product. Firms which only minimally alter the item being procured do not qualify as manufacturers of the end item, such as firms that add substances, parts, or components to an existing end item to modify its performance, will not be considered the end item manufacturer, where those identical modifications can be performed by and are available from the manufacturer of the existing end item. See 13 CFR 121.406 for further information regarding manufacturers.

(4) *Waiver of nonmanufacturer rule.* (i) The SBA may grant an individual or a class waiver so that a nonmanufacturer does not have to furnish the product of a small business (but see 19.1308(e)(2)).

(A) *Class waiver.* SBA may waive the nonmanufacturer rule when SBA has determined that there are no small business manufacturers or processors

in the Federal market for a particular class of products. This type of waiver is known as a class waiver and would apply to an acquisition for a specific product (or a product in a class of products). Contracting officers and other interested parties may request that the SBA issue a waiver of the nonmanufacturer rule, for a particular class of products.

(B) *Individual waiver.* The contracting officer may also request a waiver for an individual acquisition because no known domestic small business manufacturers or processors can reasonably be expected to offer a product meeting the requirements of the solicitation. This type of waiver is known as an individual waiver and would apply only to a specific acquisition.

(ii) Requests for waivers shall be sent via email to nmrwaivers@sba.gov or by mail to the—Director for Government Contracting, United States Small Business Administration, Mail Code 6700, 409 Third Street SW, Washington, DC 20416.

(iii) For the most current listing of class waivers, contact the SBA Office of Government Contracting or go to <https://www.sba.gov/content/class-waivers>.

(5) *Exception to the nonmanufacturer rule.* The SBA provides for an exception to the nonmanufacturer rule when—

(i) The procurement of supplies or a manufactured end product—

(A) Is processed under simplified acquisition procedures (see part 13); or

(B) Is for an order set aside for any of the small business concerns identified in 19.000(a)(3), placed under a multiple-award contract that was competed on a full and open basis;

(ii) The cost is not anticipated to exceed \$25,000; and

(iii) The offeror supplies an end product that is manufactured or produced in the United States.

[85 FR 11763, Feb. 27, 2020]

19.506 Documentation requirements.

(a)(1) The contracting officer shall document the rationale when a contract is not totally set aside for small business in accordance with 19.502-2.

(2) The contracting officer shall document the rationale when a multiple-award contract is not partially set aside, not reserved, and does not allow

for setting aside of orders, when these authorities could have been used.

(b) If applicable, the documentation shall include the rationale for not accepting the recommendations made by the agency Director of the Office of Small and Disadvantaged Business Utilization, or, for the Department of Defense, the Director of the Office of Small Business Programs, or the Director's designee, as to whether a particular acquisition should be awarded under subparts 19.5, 19.8, 19.13, 19.14, or 19.15.

(c) Documentation is not required if a contract award is anticipated to a small business under subpart 19.5, 19.8, 19.13, 19.14, or 19.15.

[85 FR 11763, Feb. 27, 2020]

19.507 Solicitation provisions and contract clauses.

(a)–(b) [Reserved]

(c) The contracting officer shall insert the clause at 52.219–6, Notice of Total Small Business Set-Aside, in solicitations and contracts involving total small business set-asides. This includes multiple-award contracts when orders may be set aside for any of the small business concerns identified in 19.000(a)(3), as described in 8.405–5 and 16.505(b)(2)(i)(F). Use the clause at 52.219–6 with its Alternate I when including FPI in the competition in accordance with 19.502–7.

(d) The contracting officer shall insert the clause at 52.219–7, Notice of Partial Small Business Set-Aside, in solicitations and contracts involving partial small business set-asides. This includes part or parts of multiple-award contracts, including those described in 38.101. Use the clause at 52.219–7 with its Alternate I when including FPI in the competition in accordance with 19.502–7.

(e) The contracting officer shall insert the clause at 52.219–14, Limitations on Subcontracting, in solicitations and contracts for supplies, services, and construction, if any portion of the requirement is to be set aside for small business and the contract amount is expected to exceed the simplified acquisition threshold. This includes multiple-award contracts when orders may be set aside for small business concerns, as described in 8.405–5 and

16.505(b)(2)(i)(F), and when orders may be issued directly to a small business concern as described in 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (d) of the clause whether compliance with the limitations on subcontracting is required at the contract or order level.

(f)(1) The contracting officer shall insert the clause at 52.219–13, Notice of Set-Aside of Orders, in all solicitations for multiple-award contracts under which orders may be set aside for any of the small business concerns identified in 19.000(a)(3), and all contracts awarded from such solicitations.

(2) The contracting officer shall insert the clause at 52.219–13 with its Alternate I in all full and open solicitations and contracts for multiple-award contracts under which orders will be set aside for any of the small business concerns identified in 19.000(a)(3) if the conditions in 19.502–2 are met at the time of order set-aside, and the specific program eligibility requirements, as applicable, are also then met.

(g)(1) The contracting officer shall insert the provision at 52.219–31, Notice of Small Business Reserve, in solicitations for multiple-award contracts that have reserves.

(2) The contracting officer shall insert the clause at 52.219–32 Orders Issued Directly Under Small Business Reserves, in solicitations and the resulting multiple-award contracts that have reserves.

(h) The contracting officer shall insert the clause at 52.219–33, Nonmanufacturer Rule, in solicitations and contracts when the item being acquired has been assigned a manufacturing or supply NAICS code, and any portion of the requirement is set-aside for any of the small business concerns identified in 19.000(a)(3) including multiple-award contracts that provide for the set-aside of orders to small business concerns or for orders issued directly to one small business concern in accordance with 19.504(c)(1)(ii), or is awarded on a sole source basis in accordance with subpart 19.8, 19.13, 19.14, or 19.15. The clause shall not be used when the Small Business Administration has determined that there are no small business manufacturers of the product or

19.601

end items and has waived the non-manufacturer rule (see 19.505(c)(4)).

[48 FR 42240, June 9, 1987. Redesignated and amended at 85 FR 11764, Feb. 27, 2020; 85 FR 27090, May 6, 2020]

Subpart 19.6—Certificates of Competency and Determinations of Responsibility

19.601 General.

(a) A Certificate of Competency (COC) is the certificate issued by the Small Business Administration (SBA) stating that the holder is responsible (with respect to all elements of responsibility, including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting) for the purpose of receiving and performing a specific Government contract.

(b) The COC program empowers the Small Business Administration (SBA) to certify to Government contracting officers as to all elements of responsibility of any small business concern to receive and perform a specific Government contract. The COC program does not extend to questions concerning regulatory requirements imposed and enforced by other Federal agencies.

(c) The COC program is applicable to all Government acquisitions. A contracting officer shall, upon determining an apparent successful small business offeror to be nonresponsible, refer that small business to the SBA for a possible COC, even if the next acceptable offer is also from a small business.

(d) When a solicitation requires a small business to adhere to the limitations on subcontracting, a contracting officer's finding that a small business cannot comply with the limitation shall be treated as an element of responsibility and shall be subject to the COC process. When a solicitation requires a small business to adhere to the definition of a nonmanufacturer, a contracting officer's determination that the small business does not comply shall be processed in accordance with subpart 19.3.

(e) Contracting officers, including those located overseas, are required to

48 CFR Ch. 1 (10-1-20 Edition)

comply with this subpart for U.S. small business concerns.

(f) For the purpose of receiving a COC on an unrestricted acquisition, a small business nonmanufacturer may furnish any end item produced or manufactured in the United States or its outlying areas.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 54 FR 34754, Aug. 21, 1989; 59 FR 67036, Dec. 28, 1994; 61 FR 67410, Dec. 20, 1996; 62 FR 44820, Aug. 22, 1997; 85 FR 11764, Feb. 27, 2020]

19.602 Procedures.

19.602-1 Referral.

(a) Upon determining and documenting that an apparent successful small business offeror lacks certain elements of responsibility (including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting but for sureties see 28.101-3(f) and 28.203(c)), the contracting officer shall—

(1) Withhold contract award (see 19.602-3); and

(2) Refer the matter to the cognizant SBA Government Contracting Area Office (Area Office) serving the area in which the headquarters of the offeror is located, in accordance with agency procedures, except that referral is not necessary if the small business concern—

(i) Is determined to be unqualified and ineligible because it does not meet the standard in 9.104-1(g); *provided*, that the determination is approved by the chief of the contracting office; or

(ii) Is suspended or debarred under Executive Order 11246 or subpart 9.4.

(b) If a partial set-aside is involved, the contracting officer shall refer to the SBA the entire quantity to which the concern may be entitled, if responsible.

(c) The referral shall include—

(1) A notice that a small business concern has been determined to be nonresponsible, specifying the elements of responsibility the contracting officer found lacking; and

(2) If applicable, a copy of the following:

(i) Solicitation.

Federal Acquisition Regulation

19.602-3

(ii) Final offer submitted by the concern whose responsibility is at issue for the procurement.

(iii) Abstract of bids or the contracting officer's price negotiation memorandum.

(iv) Preaward survey.

(v) Technical data package (including drawings, specifications and statement of work).

(vi) Any other justification and documentation used to arrive at the nonresponsibility determination.

(d) For any single acquisition, the contracting officer shall make only one referral at a time regarding a determination of nonresponsibility.

(e) Contract award shall be withheld by the contracting officer for a period of 15 business days (or longer if agreed to by the SBA and the contracting officer) following receipt by the appropriate SBA Area Office of a referral that includes all required documentation.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 27489, July 31, 1986; 62 FR 44820, Aug. 22, 1997; 70 FR 57461, Sept. 30, 2005]

19.602-2 Issuing or denying a Certificate of Competency (COC).

Within 15 business days (or a longer period agreed to by the SBA and the contracting agency) after receiving a notice that a small business concern lacks certain elements of responsibility, the SBA Area Office will take the following actions:

(a) Inform the small business concern of the contracting officer's determination and offer it an opportunity to apply to the SBA for a COC. (A concern wishing to apply for a COC should notify the SBA Area Office serving the geographical area in which the headquarters of the offeror is located.)

(b) Upon timely receipt of a complete and acceptable application, elect to visit the applicant's facility to review its responsibility.

(1) The COC review process is not limited to the areas of nonresponsibility cited by the contracting officer.

(2) The SBA may, at its discretion, independently evaluate the COC applicant for all elements of responsibility, but may presume responsibility exists as to elements other than those cited as deficient.

(c) Consider denying a COC for reasons of nonresponsibility not originally cited by the contracting officer.

(d) When the Area Director determines that a COC is warranted (for contracts valued at \$25,000,000 or less), notify the contracting officer and provide the following options:

(1) Accept the Area Director's decision to issue a COC and award the contract to the concern. The COC issuance letter will then be sent, including as an attachment a detailed rationale for the decision; or

(2) Ask the Area Director to suspend the case for one or more of the following purposes:

(i) To permit the SBA to forward a detailed rationale for the decision to the contracting officer for review within a specified period of time.

(ii) To afford the contracting officer the opportunity to meet with the Area Office to review all documentation contained in the case file and to attempt to resolve any issues.

(iii) To submit any information to the SBA Area Office that the contracting officer believes the SBA did not consider (at which time the SBA Area Office will establish a new suspense date mutually agreeable to the contracting officer and the SBA).

(iv) To permit resolution of an appeal by the contracting agency to SBA Headquarters under 19.602-3. However, there is no contracting officer's appeal when the Area Office proposes to issue a COC valued at \$100,000 or less.

(e) At the completion of the process, notify the concern and the contracting officer that the COC is denied or is being issued.

(f) Refer recommendations for issuing a COC on contracts greater than \$25,000,000 to SBA Headquarters.

[62 FR 44820, Aug. 22, 1997]

19.602-3 Resolving differences between the agency and the Small Business Administration.

(a) *COCs valued between \$100,000 and \$25,000,000.* (1) When disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution before the SBA takes final action on a COC. This shall be done

through the complete exchange of information and in accordance with agency procedures. If agreement cannot be reached between the contracting officer and the SBA Area Office, the contracting officer shall request that the Area Office suspend action and refer the matter to SBA Headquarters for review. The SBA Area Office shall honor the request for a review if the contracting officer agrees to withhold award until the review process is concluded. Without an agreement to withhold award, the SBA Area Office will issue the COC in accordance with applicable SBA regulations.

(2) SBA Headquarters will furnish written notice to the procuring agency's Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) or, for the Department of Defense, the Director of the Office of Small Business Programs, or other designated official (with a copy to the contracting officer) that the case file has been received and that an appeal decision may be requested by an authorized official.

(3) If the contracting agency decides to file an appeal, it must notify SBA Headquarters through its procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a time period agreed upon by both agencies) that it intends to appeal the issuance of the COC.

(4) The appeal and any supporting documentation shall be filed by the procuring agency's Director, OSDBU, or other designated official, within 10 business days (or a period agreed upon by both agencies) after SBA Headquarters receives the agency's notification in accordance with paragraph (a)(3) of this subsection.

(5) The SBA Associate Administrator for Government Contracting will make a final determination, in writing, to issue or to deny the COC.

(b) *SBA Headquarters' decisions on COCs valued over \$25,000,000.* (1) Prior to taking final action, SBA Headquarters will contact the contracting agency and offer it the following options:

(i) To request that the SBA suspend case processing to allow the agency to meet with SBA Headquarters personnel and review all documentation contained in the case file; or

(ii) To submit to SBA Headquarters for evaluation any information that the contracting agency believes has not been considered.

(2) After reviewing all available information, the SBA will make a final decision to either issue or deny the COC.

(c) *Reconsideration of a COC after issuance.* (1) The SBA reserves the right to reconsider its issuance of a COC, prior to contract award, if—

(i) The COC applicant submitted false information or omitted materially adverse information; or

(ii) The COC has been issued for more than 60 days (in which case the SBA may investigate the firm's current circumstances).

(2) When the SBA reconsiders and reaffirms the COC, the procedures in subsection 19.602-2 do not apply.

(3) Denial of a COC by the SBA does not preclude a contracting officer from awarding a contract to the referred concern, nor does it prevent the concern from making an offer on any other procurement.

[62 FR 44821, Aug. 22, 1997, as amended at 85 FR 11764, Feb. 27, 2020]

19.602-4 Awarding the contract.

(a) If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made under paragraph (c) below, the contracting officer shall reverse the determination of nonresponsibility, notify the SBA of this action, withdraw the referral, and proceed to award the contract.

(b) The contracting officer shall award the contract to the concern in question if the SBA issues a COC after receiving the referral. An SBA-certified concern shall not be required to meet any other requirements of responsibility. SBA COC's are conclusive with respect to all elements of responsibility of prospective small business contractors. Where SBA issues a COC, the contracting officer may decide not to award to that offeror for reasons unrelated to responsibility.

(c) The contracting officer shall proceed with the acquisition and award the contract to another appropriately

selected and responsible offeror if the SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral.

[48 FR 42240, Sept. 19, 1983, as amended at 85 FR 11764, Feb. 27, 2020]

Subpart 19.7—The Small Business Subcontracting Program

19.701 Definitions.

As used in this subpart—

Alaska Native Corporation (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C.A. 1601, *et seq.*) and which is considered a minority and economically disadvantaged concern under the criteria at 43 U.S.C. 1626(e)(1). This definition also includes ANC direct and indirect subsidiary corporations, joint ventures, and partnerships that meet the requirements of 43 U.S.C. 1626(e)(2).

Commercial plan means a subcontracting plan (including goals) that covers the offeror's fiscal year and that applies to the entire production of commercial items sold by either the entire company or a portion thereof (e.g., division, plant, or product line).

Electronic Subcontracting Reporting System (eSRS) means the Government-wide, electronic, web-based system for small business subcontracting program reporting.

Failure to make a good faith effort to comply with the subcontracting plan means willful or intentional failure to perform in accordance with the requirements of the subcontracting plan, or willful or intentional action to frustrate the plan.

Indian tribe means any Indian tribe, band, group, pueblo, or community, including native villages and native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the Alaska Native Claims Settlement Act (43 U.S.C.A. 1601 *et seq.*), that is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs in accordance with 25 U.S.C.

1452(c). This definition also includes Indian-owned economic enterprises that meet the requirements of 25 U.S.C. 1452(e).

Individual subcontracting plan means a subcontracting plan that covers the entire contract period (including option periods), applies to a specific contract, and has goals that are based on the offeror's planned subcontracting in support of the specific contract, except that indirect costs incurred for common or joint purposes may be allocated on a prorated basis to the contract.

Master subcontracting plan means a subcontracting plan that contains all the required elements of an individual subcontracting plan, except goals, and may be incorporated into individual subcontracting plans, provided the master subcontracting plan has been approved.

Reduced Payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract, contract modification, or subcontract.

Total contract dollars means the final anticipated dollar value, including the dollar value of all options.

Untimely Payment means a payment to a subcontractor that is more than 90 days past due under the terms and conditions of a subcontract for supplies and services for which the Government has paid the prime contractor.

[63 FR 34064, June 22, 1998, as amended at 66 FR 2130, Jan. 10, 2001; 72 FR 46348, Aug. 17, 2007; 73 FR 21781, Apr. 22, 2008; 81 FR 45843, July 14, 2016; 81 FR 93485, Dec. 20, 2016]

19.702 Statutory requirements.

Any contractor receiving a contract with a value greater than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and

women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance. It is further the policy of the United States that its prime contractors establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns.

(a)(1) Except as stated in paragraph (b) of this section, section 8(d) of the Small Business Act (15 U.S.C. 637(d)) imposes the following requirements regarding subcontracting with small businesses and small business subcontracting plans:

(i) In negotiated acquisitions, each solicitation of offers to perform a contract that is expected to exceed \$700,000 (\$1.5 million for construction) and that has subcontracting possibilities, shall require the apparently successful offeror to submit an acceptable subcontracting plan. If the apparently successful offeror fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award. For a multiple-award contract with more than one North American Industry Classification System (NAICS) code, see paragraph (a)(2)(i) of this section.

(ii) In sealed bidding acquisitions, each invitation for bids to perform a contract that is expected to exceed \$700,000 (\$1.5 million for construction) and that has subcontracting possibilities, shall require the bidder selected for award to submit a subcontracting plan. If the selected bidder fails to submit a plan within the time limit prescribed by the contracting officer, the bidder will be ineligible for award. For a multiple-award contract with more than one NAICS code, see paragraph (a)(2)(i) of this section.

(iii) Each contract modification that causes the value of a contract without a subcontracting plan to exceed \$700,000 (\$1.5 million for construction), shall require the contractor to submit a sub-

contracting plan for the contract, if the contracting officer determines that subcontracting opportunities exist. For a multiple-award contract with more than one NAICS code, see paragraph (a)(2)(ii) of this section.

(2)(i) For a multiple-award contract with more than one NAICS code, the solicitation referenced in paragraphs (a)(1)(i) and (ii) of this section shall require the apparently successful offeror to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of their proposal for which the offeror is other than small or for the entirety of their proposal, at the offeror's discretion. When determining the need for a subcontracting plan, the contracting officer shall consider the cumulative dollar value of the portion(s) or category(ies) of the offeror's proposal for which the offeror is other than small.

(ii) For a multiple-award contract with more than one NAICS code, the modification referenced in paragraph (a)(1)(iii) of this section shall require the contractor to submit an acceptable subcontracting plan for either the distinct portion(s) or category(ies) of the contract for which the contractor is other than small or for the entirety of their contract, at the contractor's discretion. When determining the need for a subcontracting plan, the contracting officer shall consider the cumulative dollar value of the portion(s) or category(ies) of the contract for which the contractor is other than small.

(b) Subcontracting plans (see paragraphs (a)(1) and (2) of this section) are not required—

(1) From small business concerns;

(2) For personal services contracts;

(3) For contracts or contract modifications that will be performed entirely outside of the United States and its outlying areas; or

(4) For modifications that are within the scope of the contract and the contract does not contain the clause at 52.219–8, Utilization of Small Business Concerns.

(c) As stated in 15 U.S.C. 637(d)(9), any contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract. Further, 15 U.S.C. 637(d)(4)(F) directs

that a contractor's failure to make a good faith effort to comply with the requirements of the subcontracting plan shall result in the imposition of liquidated damages.

(d) As authorized by 15 U.S.C. 637(d)(12), certain costs incurred by a mentor firm in providing developmental assistance to a protégé firm under the Department of Defense Pilot Mentor-Protégé Program, may be credited as if they were subcontract awards to a protégé firm for the purpose of determining whether the mentor firm attains the applicable goals under any subcontracting plan entered into with any executive agency. However, the mentor-protégé agreement must have been approved by the Director, Small Business Programs of the cognizant DoD military department or defense agency, before developmental assistance costs may be credited against subcontract goals. A list of approved agreements may be obtained at http://www.acq.osd.mil/osbp/mentor_protege/.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.702, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.703 Eligibility requirements for participating in the program.

(a) Except as provided in paragraph (c) of this section, to be eligible as a subcontractor under the program, a concern must represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concern.

(1) To represent itself as a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business concern, a concern must meet the appropriate definition (see 2.101 and 19.001). For subcontracting purposes, a concern is small if it does not exceed the size standard for the NAICS code that the prime contractor determines best describes the product or service being acquired by the subcontract.

(2)(i) The prime contractor may accept a subcontractor's written representations of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business, if the subcontractor represents that the size and socioeconomic status representation with its offer are current, accurate, and complete as of the date of the offer for the subcontracts; or

(ii) The prime contractor may accept a subcontractor's representation of its size and socioeconomic status as a small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, or a women-owned small business in the System for Award Management (SAM) if—

(A) The subcontractor is registered in SAM; and

(B) The subcontractor represents that the size and socioeconomic status representations made in SAM are current, accurate and complete as of the date of the offer for the subcontract.

(iii) The prime contractor may not require the use of SAM for the purposes of representing size or socioeconomic status in connection with a subcontract.

(iv) In accordance with 13 CFR 121.411, 124.1015, 125.29, 126.900, and 127.700, a prime contractor acting in good faith is not liable for misrepresentations made by its subcontractors regarding the subcontractor's size or socioeconomic status.

(b) The contractor, the contracting officer, or any other interested party can challenge a subcontractor's size status representation by filing a protest, in accordance with 13 CFR 121.1001 through 121.1008.

(c)(1) In accordance with 43 U.S.C. 1626, the following procedures apply:

(i) Subcontracts awarded to an ANC or Indian tribe shall be counted towards the subcontracting goals for small business and small disadvantaged business (SDB) concerns, regardless of the size or Small Business Administration certification status of the ANC or Indian tribe.

(ii) Where one or more subcontractors are in the subcontract tier between the prime contractor and the ANC or Indian tribe, the ANC or Indian tribe shall designate the appropriate contractor(s) to count the subcontract towards its small business and small disadvantaged business subcontracting goals.

(A) In most cases, the appropriate contractor is the contractor that awarded the subcontract to the ANC or Indian tribe.

(B) If the ANC or Indian tribe designates more than one contractor to count the subcontract toward its goals, the ANC or Indian tribe shall designate only a portion of the total subcontract award to each contractor. The sum of the amounts designated to various contractors cannot exceed the total value of the subcontract.

(C) The ANC or Indian tribe shall give a copy of the written designation to the contracting officer, the prime contractor, and the subcontractors in between the prime contractor and the ANC or Indian tribe within 30 days of the date of the subcontract award.

(D) If the contracting officer does not receive a copy of the ANC's or the Indian tribe's written designation within 30 days of the subcontract award, the contractor that awarded the subcontract to the ANC or Indian tribe will be considered the designated contractor.

(2) A contractor acting in good faith may rely on the written representation of an ANC or an Indian tribe as to the status of the ANC or Indian tribe unless an interested party challenges its status or the contracting officer has independent reason to question its status. In the event of a challenge of a representation of an ANC or Indian tribe, the interested parties shall follow the procedures at 26.103(b) through (e).

(d)(1) The contractor shall confirm that a subcontractor representing itself as a HUBZone small business concern is certified by SBA as a HUBZone small business concern by accessing the SAM or by contacting the SBA. Options for contacting the SBA include—

(i) HUBZone small business database search application Web page at [http://](http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm)

dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm or

(ii) In writing to the Director/HUBZone Program, U.S. Small Business Administration, 409 3rd Street, SW., Washington DC 20416; or

(iii) E-mail at hubzone@sba.gov.

(2) Protests challenging the socioeconomic status of a HUBZone small business concern must be filed in accordance with 13 CFR 126.801.

(e) The contracting officer or the SBA may protest the disadvantaged status of a proposed subcontractor. Protests challenging a subcontractor's small disadvantaged business representation must be filed in accordance with 13 CFR 124.1007 through 124.1014. Other interested parties may submit information to the contracting officer or the SBA in an effort to persuade the contracting officer or the SBA to initiate a protest. Such protests, in order to be considered timely, must be submitted to the SBA prior to completion of performance by the intended subcontractor.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.703, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.704 Subcontracting plan requirements.

(a) Each subcontracting plan under 19.301–2(e) and 19.702(a)(1)(i), (ii), and (iii) shall include—

(1) Separate percentage goals for using small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes) and women-owned small business concerns as subcontractors;

(2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes) and women-owned

small business concerns, as a percentage of total subcontract dollars. For individual subcontracting plans only, a contracting officer may require the goals referenced in paragraph (a)(1) of this section to be calculated as a percentage of total contract dollars, in addition to the goals established as a percentage of total subcontract dollars;

(3) A description of the principal types of supplies and services to be subcontracted and an identification of types of supplies or services planned for subcontracting to small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes), and women-owned small business concerns;

(4) A description of the method used to develop the subcontracting goals;

(5) A description of the method used to identify potential sources for solicitation purposes;

(6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business (including ANCs and Indian tribes), veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business (including ANCs and Indian tribes), and women-owned small business concerns;

(7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;

(8) A description of the efforts the offeror will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns have an equitable opportunity to compete for subcontracts;

(9) Assurances that the offeror will include the clause at 52.219-8, Utilization of Small Business Concerns (see 19.708(a)), in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all

subcontractors (except small business concerns) that receive subcontracts in excess of \$700,000 (\$1.5 million for construction) to adopt a plan that complies with the requirements of the clause at 52.219-9, Small Business Subcontracting Plan (see 19.708(b));

(10) Assurances that the offeror will—

(i) Cooperate in any studies or surveys as may be required;

(ii) Submit periodic reports so that the Government can determine the extent of compliance by the offeror with the subcontracting plan;

(iii) After November 30, 2017, include subcontracting data for each order when reporting subcontracting achievements for indefinite-delivery, indefinite-quantity contracts with individual subcontracting plans where the contract is intended for use by multiple agencies;

(iv) Submit the Individual Subcontract Report (ISR), and the Summary Subcontract Report (SSR) using the Electronic Subcontracting Reporting System (eSRS) (<http://www.esrs.gov>), following the instructions in the eSRS.

(A) The ISR shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the contracting officer. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period. When a contracting officer rejects an ISR, the contractor is required to submit a revised ISR within 30 days of receiving the notice of the ISR rejection.

(B) The SSR shall be submitted annually by October 30 for the twelve-month period ending September 30. When an SSR is rejected, the contractor is required to submit a revised SSR within 30 days of receiving the notice of SSR rejection;

(v) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and/or the SSR using the eSRS;

(vi) Provide its prime contract number, its unique entity identifier, and

the e-mail address of the offeror's official responsible for acknowledging receipt of or rejecting the ISRs to all first-tier subcontractors with subcontracting plans so they can enter this information into the eSRS when submitting their ISRs; and

(vii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans;

(11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns and to award subcontracts to them;

(12) Assurances that the offeror will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that the offeror used in preparing the bid or proposal, in the same or greater scope, amount, and quality used in preparing and submitting the bid or proposal. Responding to a request for a quote does not constitute use in preparing a bid or proposal. An offeror used a small business concern in preparing the bid or proposal if—

(i) The offeror identifies the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan, to furnish certain supplies or perform a portion of the contract; or

(ii) The offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract;

(13) Assurances that the contractor will provide the contracting officer with a written explanation if the contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (a)(12) of this section. This written explanation will be submitted to the contracting officer within 30 days of contract completion;

(14) Assurances that the contractor will not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to payment to or utilization of a subcontractor; and

(15) Assurances that the offeror will pay its small business subcontractors on time and in accordance with the terms and conditions of the subcontract, and notify the contracting officer if the offeror pays a reduced or an untimely payment to a small business subcontractor (see 52.242-5).

(b) Contractors may establish, on a plant or division-wide basis, a master subcontracting plan (see 19.701) that contains all the elements required by the clause at 52.219-9, Small Business Subcontracting Plan, except goals. Master subcontracting plans shall be effective for a 3-year period after approval by the contracting officer; however, it is incumbent upon contractors to maintain and update master subcontracting plans. Changes required to update master subcontracting plans are not effective until approved by the contracting officer. A master subcontracting plan, when incorporated in an individual plan, shall apply to that contract throughout the life of the contract.

(c) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary. If a subcontracting plan is necessary and the offeror is submitting an individual subcontracting plan, the individual subcontracting plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals based on total subcontract dollars for the basic contract and for each option.

(d) A commercial plan (as defined in 19.701) is the preferred type of subcontracting plan for contractors furnishing commercial items. Once a contractor's commercial plan has been approved, the Government shall not require another subcontracting plan from the same contractor while the plan remains in effect, as long as the product or service being provided by the contractor continues to meet the definition of a commercial item. The contractor shall—

(1) Submit the commercial plan to either the first contracting officer awarding a contract subject to the plan during the contractor's fiscal year, or, if the contractor has ongoing contracts with commercial plans, to the contracting officer responsible for the contract with the latest completion date. The contracting officer shall negotiate the commercial plan for the Government. The approved commercial plan shall remain in effect during the contractor's fiscal year for all Government contracts in effect during that period;

(2) Submit a new commercial plan, 30 working days before the end of the Contractor's fiscal year, to the contracting officer responsible for the uncompleted Government contract with the latest completion date. The contractor must provide to each contracting officer responsible for an ongoing contract subject to the plan, the identity of the contracting officer that will be negotiating the new plan;

(3) When the new commercial plan is approved, provide a copy of the approved plan to each contracting officer responsible for an ongoing contract that is subject to the plan; and

(4) Comply with the reporting requirements stated in paragraph (a)(10) of this section by submitting one SSR in eSRS, for all contracts covered by its commercial plan. This report will be acknowledged or rejected in eSRS by the contracting officer who approved the plan. The report shall be submitted within 30 days after the end of the Government's fiscal year.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.704, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-1 General.

(a) The contracting officer may encourage the development of increased subcontracting opportunities in negotiated acquisition by providing monetary incentives such as payments based on actual subcontracting achievement or award-fee contracting (see the clause at 52.219-10, Incentive Subcontracting Program, and 19.708(c)). When using any contractual incentive provision based upon rewarding the contractor monetarily for exceeding goals in the subcontracting plan, the contracting officer must ensure that (a) the goals are realistic and (b) any rewards for exceeding the goals are commensurate with the efforts the contractor would not have otherwise expended. Incentive provisions should normally be negotiated after reaching final agreement with the contractor on the subcontracting plan.

(b)(1) Except where a contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each indefinite-delivery, indefinite-quantity contract (including task or delivery order contracts, FSS, GWACs, and MACs), when the estimated value of the contract meets the subcontracting plan thresholds at 19.702(a) and small business subcontracting opportunities exist.

(2) Contracting officers placing orders may establish small business subcontracting goals for each order. Establishing goals shall not be in the form of a new subcontracting plan as a contract may not have more than one plan (19.705-2(e)).

[48 FR 42240, Sept. 19, 1983, as amended at 60 FR 48262, Sept. 18, 1995; 63 FR 34065, June 22, 1998; 63 FR 36123, July 1, 1998; 79 FR 61750, Oct. 14, 2014; 81 FR 45845, July 14, 2016; 85 FR 11765, Feb. 27, 2020]

19.705-2 Determining the need for a subcontracting plan.

The contracting officer shall take the following actions to determine whether a proposed contractual action requires a subcontracting plan:

(a)(1) Determine whether the proposed total contract-dollars will exceed

the subcontracting plan threshold in 19.702(a).

(2) Determine whether a proposed modification will cause the total contract dollars to exceed the subcontracting plan threshold (see 19.702(a)).

(b) Determine whether subcontracting possibilities exist by considering relevant factors such as—

(1) Whether firms engaged in the business of furnishing the types of items to be acquired customarily contract for performance of part of the work or maintain sufficient in-house capability to perform the work;

(2) Whether there are likely to be product prequalification requirements; and

(3) Whether the firm can acquire any portion of the work with minimal or no disruption to performance (with consideration given to the time remaining until contract completion), and at fair market value, when a determination is made in accordance with paragraph (a)(2).

(c) If it is determined that there are no subcontracting possibilities, the determination shall include a detailed rationale, be approved at a level above the contracting officer, and placed in the contract file.

(d) In solicitations for negotiated acquisitions, the contracting officer may require the submission of subcontracting plans with initial offers, or at any other time prior to award. In determining when subcontracting plans should be required, as well as when and with whom plans should be negotiated, the contracting officer must consider the integrity of the competitive process, the goal of affording maximum practicable opportunity for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns to participate, and the burden placed on offerors.

(e) A contract may not have more than one subcontracting plan. However, a contracting officer may establish separate subcontracting goals for each order under an indefinite-delivery, indefinite-quantity contract (19.705-1(b)(2)). When a contract modification exceeds the subcontracting

plan threshold (see 19.702(a)) or an option is exercised, the goals of an existing subcontracting plan shall be amended to reflect any new subcontracting opportunities not envisioned at the time of contract award. These goal changes do not apply retroactively.

(f) If a subcontracting plan has been added to the contract due to a modification (see 19.702(a)(1)(iii)) or a size rerepresentation (see 19.301-2(e)), the subcontracting goals apply from the date of incorporation of the subcontracting plan into the contract and the contractor's achievements must be reported on the ISR (or the SF-294, if applicable) on a cumulative basis from the date of incorporation of the subcontracting plan into the contract.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 51 FR 19716, May 30, 1986; 60 FR 48262, Sept. 18, 1995; 61 FR 2638, Jan. 26, 1996; 63 FR 70271, Dec. 18, 1998; 65 FR 60545, Oct. 11, 2000; 66 FR 53493, Oct. 22, 2001; 73 FR 21781, Apr. 22, 2008; 81 FR 45845, July 14, 2016; 85 FR 11765, Feb. 27, 2020]

19.705-3 Preparing the solicitation.

The contracting officer shall provide the Small Business Administration's (SBA's) procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) a reasonable period of time to review any solicitation requiring submission of a subcontracting plan and to submit advisory findings before the solicitation is issued.

[71 FR 36926, June 28, 2006]

19.705-4 Reviewing the subcontracting plan.

The contracting officer shall review the subcontracting plan for adequacy, ensuring that the required information, goals, and assurances are included (see 19.704).

(a) No detailed standards apply to every subcontracting plan. Instead, the contracting officer shall consider each plan in terms of the circumstances of the particular acquisition, including—

(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar acquisitions;

(2) Proven methods of involving small business concerns as subcontractors in similar acquisitions; and

(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) If, under a sealed bid solicitation, a bidder submits a plan that does not cover each of the 15 required elements (see 19.704), the contracting officer shall advise the bidder of the deficiency and request submission of a revised plan by a specific date. If the bidder does not submit a plan that incorporates the required elements within the time allotted, the bidder shall be ineligible for award. If the plan, although responsive, evidences the bidder's intention not to comply with its obligations under the clause at 52.219-8, Utilization of Small Business Concerns, the contracting officer may find the bidder nonresponsible.

(c) In negotiated acquisitions, the contracting officer shall determine whether the plan is acceptable based on the negotiation of each of the 15 elements of the plan (see 19.704). Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors to the maximum practicable extent. The contracting officer shall take particular care to ensure that the offeror has not submitted unreasonably low goals to minimize exposure to liquidated damages and to avoid the administrative burden of substantiating good faith efforts. Additionally, particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase the Government's cost or seriously impede the attainment of acquisition objectives. An incentive subcontracting clause (see 52.219-10, Incentive Subcontracting Program), may be used when additional and unique contract effort, such as pro-

viding technical assistance, could significantly increase subcontract awards to small business, small disadvantaged business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, or women-owned small business concerns.

(d) In determining the acceptability of a proposed subcontracting plan, the contracting officer should take the following actions:

(1) Obtain information available from the cognizant contract administration office, as provided for in 19.706(a), and evaluate the offeror's past performance in awarding subcontracts for the same or similar products or services to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. If information is not available on a specific type of product or service, evaluate the offeror's overall past performance and consider the performance of other contractors on similar efforts.

(2) In accordance with 15 U.S.C. 637(d)(4)(F)(iii), ensure that the goals offered are attainable in relation to—

(i) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;

(ii) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and

(iii) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

(3) Ensure that the subcontracting goals are consistent with the offeror's certified cost or pricing data or data other than certified cost or pricing data.

(4) Evaluate the offeror's make-or-buy policy or program to ensure that it does not conflict with the offeror's proposed subcontracting plan and is in the Government's interest. If the contract involves products or services that are particularly specialized or not generally available in the commercial market, consider the offeror's current capacity to perform the work and the possibility of reduced subcontracting opportunities.

(5) Evaluate subcontracting potential, considering the offeror's make-or-buy policies or programs, the nature of the supplies or services to be subcontracted, the known availability of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in the geographical area where the work will be performed, and the potential contractor's long-standing contractual relationship with its suppliers.

(6) Advise the offeror of available sources of information on potential small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontractors, as well as any specific concerns known to be potential subcontractors. If the offerors proposed goals are questionable, the contracting officer must emphasize that the information should be used to develop realistic and acceptable goals.

(7) Obtain advice and recommendations from the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) and the agency small business specialist.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.705-4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

19.705-5 Awards involving subcontracting plans.

(a) In making an award that requires a subcontracting plan, the contracting officer shall be responsible for the following:

(1) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(2) Assure that a subcontracting plan was submitted when required.

(3) Notify the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) of the opportunity to review the proposed contract (including

the plan and supporting documentation). The notice shall be issued in sufficient time to provide the representative a reasonable time to review the material and submit advisory recommendations to the contracting officer. Failure of the representative to respond in a reasonable period of time shall not delay contract award.

(4) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(5) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

(b) Letter contracts and similar undefinitized instruments, which would otherwise meet the requirements of 19.702(a)(1)(i) and (ii), shall contain at least a preliminary basic plan addressing the requirements of 19.704 and in such cases require the negotiation of the final plan within 90 days after award or before definitization, whichever occurs first.

[48 FR 42240, Sept. 19, 1983, as amended at 50 FR 1743, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 71 FR 36926, June 28, 2006; 85 FR 11765, Feb. 27, 2020]

19.705-6 Postaward responsibilities of the contracting officer.

After a contract or contract modification containing a subcontracting plan is awarded or an existing subcontracting plan is amended, the contracting officer shall do the following:

(a) Notify the SBA of the award by sending a copy of the award document to the Area Director, Office of Government Contracting, in the SBA area office where the contract will be performed.

(b) Forward a copy of each commercial plan and any associated approvals to the Area Director, Office of Government Contracting, in the SBA area office where the contractor's headquarters is located.

(c) Give to the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) a copy of—

(1) Any subcontracting plan submitted in response to a sealed bid solicitation; and

(2) The final negotiated subcontracting plan that was incorporated

Federal Acquisition Regulation

19.705-7

into a negotiated contract or contract modification.

(d) Notify the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Forward a copy of each plan, or a determination that there is no requirement for a subcontracting plan, to the cognizant contract administration office.

(f) Monitor the prime contractor's compliance with its subcontracting plan, to include the following:

(1) Ensure that subcontracting reports are submitted into the eSRS within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th).

(2) Review ISRs, and where applicable, SSRs, in eSRS within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th).

(3) Either acknowledge receipt of or reject the reports in accordance with subpart 19.7, 52.219-9, Small Business Subcontracting Plan, and the eSRS instructions (*www.esrs.gov*).

(i) The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan.

(ii) If a report is rejected, the contracting officer must provide an explanation for the rejection to allow the prime contractor the opportunity to respond specifically to identified deficiencies.

(g) Evaluate the prime contractor's compliance with its subcontracting plan, to include the following:

(1) Assess whether the prime contractor made a good faith effort to comply with its small business subcontracting plan (see 13 CFR 125.3(d)(3)).

(2) Assess the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in the performance of the contract in the same scope, amount, and quality used in preparing and submitting the bid or proposal, if applicable.

(h) Initiate action to assess liquidated damages in accordance with 19.705-7 upon a recommendation by the

administrative contracting officer or receipt of other reliable evidence to indicate that such action is warranted.

(i) Take action to enforce the terms of the contract upon receipt of a notice under 19.706(f).

(j) Acknowledge receipt of or reject the ISR and the SSR in the eSRS. Acknowledging receipt does not mean acceptance or approval of the report. The report shall be rejected if it is not adequately completed, for instance, if there are errors, omissions, or incomplete data. Failure to meet the goals of the subcontracting plan is not a valid reason for rejecting the report.

[48 FR 42240, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987; 53 FR 27464, July 20, 1988; 53 FR 34228, Sept. 2, 1988; 54 FR 30709, July 21, 1989; 55 FR 52792, Dec. 21, 1990; 63 FR 34066, June 22, 1998; 63 FR 70271, Dec. 18, 1998; 71 FR 36926, June 28, 2006; 73 FR 21781, Apr. 22, 2008; 75 FR 34264, June 16, 2010; 81 FR 45845, July 14, 2016]

19.705-7 Liquidated damages.

(a) Maximum practicable utilization of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns as subcontractors in Government contracts is a matter of national interest with both social and economic benefits. When a contractor fails to make a good faith effort to comply with a subcontracting plan, these objectives are not achieved, and 15 U.S.C. 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) The amount of damages attributable to the contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontracting goal.

(c) If, at completion of the basic contract or any option, or in the case of a commercial plan, at the close of the fiscal year for which the plan is applicable, a contractor has failed to meet its subcontracting goals, the contracting officer shall review all available information for an indication that the contractor has not made a good faith effort to comply with the plan. If

no such indication is found, the contracting officer shall document the file accordingly. If the contracting officer decides in accordance with paragraph (d) of this subsection that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to the Government liquidated damages, and providing a period of 15 working days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good faith efforts have been made before the contracting officer issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists.

(d) In determining whether a contractor failed to make a good faith effort to comply with its subcontracting plan, a contracting officer must look to the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following, though not all inclusive, may be considered as indicators of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business or women-owned small business concerns;

a failure to designate and maintain a company official to administer the subcontracting program and monitor and enforce compliance with the plan; a failure to submit the ISR, or the SSR, using the eSRS, or as provided in agency regulations; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; or the adoption of company policies or procedures that have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the contracting officer finds that the contractor failed to make a good faith effort to comply with its subcontracting plan, the contracting officer shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The contracting officer's final decision shall state that the contractor has the right to appeal under the clause in the contract entitled Disputes.

(f) With respect to commercial plans approved under the clause at 52.219-9, Small Business Subcontracting Plan, the contracting officer that approved the plan shall—

(1) Perform the functions of the contracting officer under this subsection on behalf of all agencies with contracts covered by the commercial plan;

(2) Determine whether or not the goals in the commercial plan were achieved and, if they were not achieved, review all available information for an indication that the contractor has not made a good faith effort to comply with the plan, and document the results of the review;

(3) If a determination is made to assess liquidated damages, in order to calculate and assess the amount of damages, the contracting officer shall ask the contractor to provide—

(i) Contract numbers for the Government contracts subject to the plan;

(ii) The total Government sales during the contractor's fiscal year; and

(iii) The amount of payments made under the Government contracts subject to that plan that contributed to the contractor's total sales during the contractor's fiscal year; and

(4) When appropriate, assess liquidated damages on the Government's

behalf, based on the pro rata share of subcontracting attributable to the Government contracts. For example: The contractor's total actual sales were \$50 million and its actual subcontracting was \$20 million. The Government's total payments under contracts subject to the plan contributing to the contractor's total sales were \$5 million, which accounted for 10 percent of the contractor's total sales. Therefore, the pro rata share of subcontracting attributable to the Government contracts would be 10 percent of \$20 million, or \$2 million. To continue the example, if the contractor failed to achieve its small business goal by 1 percent, the liquidated damages would be calculated as 1 percent of \$2 million, or \$20,000. The contracting officer shall make similar calculations for each category of small business where the contractor failed to achieve its goal and the sum of the dollars for all of the categories equals the amount of the liquidated damages to be assessed. A copy of the contracting officer's final decision assessing liquidated damages shall be provided to other contracting officers with contracts subject to the commercial plan.

(g) Liquidated damages shall be in addition to any other remedies that the Government may have.

(h) Every contracting officer with a contract that is subject to a commercial plan shall include in the contract file a copy of the approved plan and a copy of the final decision assessing liquidating damages, if applicable.

[54 FR 30709, July 21, 1989, as amended at 60 FR 48263, Sept. 18, 1995; 63 FR 34066, June 22, 1998; 63 FR 70272, Dec. 18, 1998; 65 FR 60545, Oct. 11, 2000; 66 FR 53493, Oct. 22, 2001; 73 FR 21781, Apr. 22, 2008]

19.706 Responsibilities of the cognizant administrative contracting officer.

The administrative contracting officer is responsible for assisting in evaluating subcontracting plans, and for monitoring, evaluating, and documenting contractor performance under the clause prescribed in 19.708(b) and any subcontracting plan included in the contract. The contract administration office shall provide the necessary information and advice to support the

contracting officer, as appropriate, by furnishing—

(a) Documentation on the contractor's performance and compliance with subcontracting plans under previous contracts;

(b) Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;

(c) Information on whether the contractor's efforts to ensure the participation of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns are in accordance with its subcontracting plan;

(d) Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;

(e) Immediate notice if, during performance, the contractor is failing to meet its commitments under the clause prescribed in 19.708(b) or the subcontracting plan;

(f) Immediate notice and rationale if, during performance, the contractor is failing to comply in good faith with the subcontracting plan; and

(g) Immediate notice that performance under a contract is complete, that the goals were or were not met, and, if not met, whether there is any indication of a lack of a good faith effort to comply with the subcontracting plan.

[48 FR 42240, Sept. 19, 1983, as amended at 54 FR 30710, July 21, 1989; 60 FR 48263, Sept. 18, 1995; 63 FR 34067, June 22, 1998; 63 FR 70272, Dec. 18, 1998; 65 FR 60545, Oct. 11, 2000; 66 FR 53493, Oct. 22, 2001]

19.707 The Small Business Administration's role in carrying out the program.

(a) Under the program, the SBA may—

(1) Assist both Government agencies and contractors in carrying out their responsibilities with regard to subcontracting plans;

(2) Review (within 5 working days) any solicitation that meets the dollar threshold in 19.702(a)(1)(i) or (ii) before the solicitation is issued;

(3) Review (within 5 working days) before execution any negotiated contractual document requiring a subcontracting plan, including the plan itself, and submit recommendations to the contracting officer, which shall be advisory in nature; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to (1) prescribe the extent to which any contractor or subcontractor shall subcontract, (2) specify concerns to which subcontracts will be awarded, or (3) exercise any authority regarding the administration of individual prime contracts or subcontracts.

[48 FR 42240, Sept. 19, 1983, as amended at 51 FR 2664, Jan. 17, 1986; 85 FR 11765, Feb. 27, 2020]

19.708 Contract clauses.

(a) Insert the clause at 52.219–8, Utilization of Small Business Concerns, in solicitations and contracts when the contract amount is expected to exceed the simplified acquisition threshold unless—

(1) A personal services contract is contemplated (see 37.104); or

(2) The contract, together with all of its subcontracts, will be performed entirely outside of the United States and its outlying areas.

(b)(1) Insert the clause at 52.219–9, Small Business Subcontracting Plan, in solicitations and contracts that offer subcontracting possibilities, are expected to exceed \$700,000 (\$1.5 million for construction of any public facility), and are required to include the clause at 52.219–8, Utilization of Small Business Concerns, unless the acquisition is set aside or is to be accomplished under the 8(a) program. When—

(i) Contracting by sealed bidding rather than by negotiation, the contracting officer shall use the clause with its Alternate I;

(ii) Contracting by negotiation, and subcontracting plans are required with initial proposals as provided for in

19.705–2(d), the contracting officer shall use the clause with its Alternate II;

(iii) The contract action will not be reported in the Federal Procurement Data System pursuant to 4.606(c)(5) or (c)(6), the contracting officer shall use the clause with its Alternate III; or

(iv) Incorporating a subcontracting plan due to a modification as provided for in 19.702(a)(1)(iii), the contracting officer shall use the clause with its Alternate IV.

(2) Insert the clause at 52.219–16, Liquidated Damages—Subcontracting Plan, in all solicitations and contracts containing the clause at 52.219–9, Small Business Subcontracting Plan, or the clause with its *Alternate I, II, III, or IV*.

(c)(1) The contracting officer may, when contracting by negotiation, insert in solicitations and contracts a clause substantially the same as the clause at 52.219–10, Incentive Subcontracting Program, when a subcontracting plan is required (see 19.702), and inclusion of a monetary incentive is, in the judgment of the contracting officer, necessary to increase subcontracting opportunities for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, and is commensurate with the efficient and economical performance of the contract; unless the conditions in paragraph (c)(3) of this section are applicable. The contracting officer may vary the terms of the clause as specified in paragraph (c)(2) of this section.

(2) Various approaches may be used in the development of small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns' subcontracting incentives. They can take many forms, from a fully quantified schedule of payments based on actual subcontract achievement to an award-fee approach employing subjective evaluation criteria (see paragraph (c)(3) of this section). The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts

under the incentive subcontracting program.

(3) As specified in paragraph (c)(2) of this section, the contracting officer may include small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business subcontracting as one of the factors to be considered in determining the award fee in a cost-plus-award-fee contract; in such cases, however, the contracting officer shall not use the clause at 52.219-10, Incentive Subcontracting Program.

[48 FR 42240, Sept. 19, 1983]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 19.708, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at www.govinfo.gov.

Subpart 19.8—Contracting With the Small Business Administration (the 8(a) Program)

SOURCE: 54 FR 46005, Oct. 31, 1989, unless otherwise noted.

19.800 General.

(a) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) established a program that authorizes the Small Business Administration (SBA) to enter into all types of contracts with other agencies and award subcontracts for performing those contracts to firms eligible for program participation. This program is the “8(a) Business Development Program,” commonly referred to as the “8(a) program.” A small business that is accepted into the 8(a) program is known as a “participant.” SBA’s subcontractors are referred to as “8(a) contractors.” As used in this subpart, an 8(a) contractor is an 8(a) participant that is currently performing on a Federal contract or order that was set aside for 8(a) participants.

(b) Contracts may be awarded to the SBA for performance by eligible 8(a) participants on either a sole source or competitive basis.

(c) Acting under the authority of the program, the SBA certifies to an agency that SBA is competent and responsible to perform a specific contract.

The contracting officer has the discretion to award the contract to the SBA based upon mutually agreeable terms and conditions.

(d) The contracting officer shall comply with 19.203 before deciding to offer an acquisition to a small business concern under the 8(a) program. For acquisitions above the simplified acquisition threshold, the contracting officer shall consider 8(a) set-asides or sole source awards before considering small business set-asides.

(e) When SBA has delegated its 8(a) program contract execution authority to an agency, the contracting officer must refer to its agency supplement or other policy directives for appropriate guidance.

[82 FR 4726, Jan. 13, 2017]

19.801 [Reserved]

19.802 Determining eligibility for the 8(a) program.

Determining the eligibility of a small business to be a participant in the 8(a) program is the responsibility of the SBA. SBA’s regulations on eligibility requirements for participation in the 8(a) program are found at 13 CFR 124.101 through 124.112.

[82 FR 4727, Jan. 13, 2017]

19.803 Selecting acquisitions for the 8(a) program.

Through their cooperative efforts, the SBA and an agency match the agency’s requirements with the capabilities of 8(a) participants to establish a basis for the agency to contract with the SBA under the program. Selection is initiated in one of three ways:

(a) The SBA advises the contracting activity of an 8(a) participant’s capabilities through a search letter and requests the contracting activity to identify acquisitions to support the participant’s business plans. In these instances, the SBA will provide at a minimum the following information in order to enable the contracting activity to match an acquisition to the participant’s capabilities:

(1) Identification of the participant and its owners.

(2) Background information on the participant, including any and all information pertaining to the participant's technical ability and capacity to perform.

(3) The participant's present production capacity and related facilities.

(4) The extent to which contracting assistance is needed in the present and the future, described in terms that will enable the agency to relate the participant's plans to present and future agency requirements.

(5) If construction is involved, the request shall also include the following:

(i) A participant's capabilities in and qualifications for accomplishing various categories of construction work typically found in North American Industrial Category System subsector 236 (construction of buildings), subsector 237 (heavy and civil engineering construction), or subsector 238 (specialty trade contractors).

(ii) The participant's capacity in each construction category in terms of estimated dollar value (*e.g.*, electrical, up to \$100,000).

(b) The SBA identifies a specific requirement for one or more 8(a) participant(s) and sends a requirements letter to the agency's Office of Small and Disadvantaged Business Utilization, or for the Department of Defense, Office of Small Business Programs, requesting the contracting office offer the acquisition to the 8(a) program. In these instances, in addition to the information in paragraph (a) of this section, the SBA will provide—

(1) A clear identification of the acquisition sought; *e.g.*, project name or number;

(2) A statement as to how the required equipment and real property will be provided in order to ensure that the participant will be fully capable of satisfying the agency's requirements;

(3) If construction, information as to the bonding capability of the participant(s); and

(4) Either—

(i) If a sole source request—

(A) The reasons why the participant is considered suitable for this particular acquisition; *e.g.*, previous contracts for the same or similar supply or service; and

(B) A statement that the participant is eligible in terms of its small business size status relative to the assigned NAICS code, business support levels, and business activity targets; or

(ii) If competitive, a statement that at least two 8(a) participants are considered capable of satisfying the agency's requirements and a statement that the participants are also eligible in terms of their small business size status relative to the assigned NAICS code, business support levels, and business activity targets. If requested by the contracting office, SBA will identify at least two such participants and provide information concerning the participants' capabilities.

(c) Agencies may also review other proposed acquisitions for the purpose of identifying requirements which may be offered to the SBA. Where agencies independently, or through the self marketing efforts of an 8(a) participant, identify a requirement for the 8(a) program, they may offer on behalf of a specific 8(a) participant, for the 8(a) program in general, or for 8(a) competition.

[82 FR 4727, Jan. 13, 2017]

19.804 Evaluation, offering, and acceptance.

19.804–1 Agency evaluation.

In determining the extent to which a requirement should be offered in support of the 8(a) program, the agency should evaluate—

(a) Current and future plans to acquire the specific items or work that 8(a) participants are seeking to provide, identified in terms of—

(1) Estimated quantities of the supplies or services required or the estimated number of construction projects planned; and

(2) Performance or delivery requirements, including—

(i) Required monthly production rates, when applicable; and

(ii) For construction, the geographical location where work is to be performed;

(b) The impact of any delay in delivery;

(c) Whether the items or work have previously been acquired using small

business set-asides, and the date the items or work were acquired;

(d) Problems encountered in previous acquisitions of the items or work from the 8(a) participants or other contractors; and

(e) Any other pertinent information about known 8(a) participants, the items, or the work. This includes any information concerning the participants' products or capabilities. When necessary, the contracting agency shall make an independent review of the factors in 19.803(a) and other aspects of the participants' capabilities which would ensure the satisfactory performance of the requirement being considered for commitment to the 8(a) program.

[82 FR 4727, Jan. 13, 2017]

19.804-2 Agency offering.

(a) After completing its evaluation, the contracting office shall notify the SBA of the extent of its plans to place 8(a) contracts with the SBA for specific quantities of items or work, including 8(a) contracts that are reserved in accordance with 19.503. The notification, referred to as an offering letter, shall identify the time frames within which resulting 8(a) awards must be completed in order for the agency to meet its responsibilities. The offering letter shall also contain the following information applicable to each prospective contract:

(1) A description of the work to be performed or items to be delivered, and a copy of the statement of work, if available.

(2) The estimated period of performance.

(3) The NAICS code that applies to the principal nature of the acquisition.

(4) The anticipated dollar value of the requirement, including options, if any.

(5) Any special restrictions or geographical limitations on the requirement (for construction, include the location of the work to be performed).

(6) Any special capabilities or disciplines needed for contract performance.

(7) The type of contract anticipated.

(8) The acquisition history, if any, of the requirement, including the names and addresses of any small business

contractors that have performed this requirement during the previous 24 months.

(9) A statement that prior to the offering no solicitation for the specific acquisition has been issued as a small business, HUBZone, service-disabled veteran-owned small business set-aside, or a set-aside under the Women-Owned Small Business (WOSB) Program, and that no other public communication (such as a notice through the Governmentwide point of entry (GPE)) has been made showing the contracting agency's clear intention to set-aside the acquisition for small business, HUBZone small business, service-disabled veteran-owned small business concerns, or a set-aside under the WOSB Program.

(10) Identification of any particular 8(a) participant designated for consideration, including a brief justification, such as—

(i) The 8(a) participant, through its own efforts, marketed the requirement and caused it to be reserved for the 8(a) program; or

(ii) The acquisition is a follow-on or renewal contract and the nominated 8(a) participant is the incumbent.

(11) Bonding requirements, if applicable.

(12) Identification of all 8(a) participants which have expressed an interest in being considered for the acquisition.

(13) Identification of all SBA field offices that have asked for the acquisition for the 8(a) program.

(14) A request, if appropriate, that a requirement with an estimated contract value under the applicable competitive threshold be awarded as an 8(a) competitive contract (see 19.805-1(d)).

(15) A request, if appropriate, that a requirement with a contract value over the applicable competitive threshold be awarded as a sole source contract (see 19.805-1(b)).

(16) Any other pertinent and reasonably available data.

(b)(1) An agency offering a construction requirement for which no specific offeror is nominated should submit it to the SBA District Office for the geographical area where the work is to be performed.

(2) An agency offering a construction requirement on behalf of a specific offeror should submit it to the SBA District Office servicing that concern.

(3) Sole source requirements, other than construction, should be forwarded directly to the district office that services the nominated 8(a) participant. If the contracting officer is not nominating a specific 8(a) participant, the offering letter should be forwarded to the district office servicing the geographical area in which the contracting office is located.

(c) All requirements for 8(a) competition, other than construction, should be forwarded to the district office servicing the geographical area in which all or the major portion of the construction is to be performed. All requirements, including construction, must be synopsisized through the GPE. For construction, the synopsis must include the geographical area of the competition set forth in the SBA's acceptance letter.

[54 FR 46005, Oct. 31, 1989, as amended at 61 FR 67421, Dec. 20, 1996; 62 FR 44823, Aug. 22, 1997; 64 FR 32744, June 17, 1999; 65 FR 46057, July 26, 2000; 66 FR 27413, May 16, 2001; 69 FR 25278, May 5, 2004; 75 FR 60264, Sept. 29, 2010; 76 FR 14568, Mar. 16, 2011; 76 FR 18311, Apr. 1, 2011; 82 FR 4727, Jan. 13, 2017; 85 FR 11765, Feb. 27, 2020]

19.804-3 SBA acceptance.

(a) Upon receipt of the contracting office's offering letter, SBA will determine whether to accept the requirement for the 8(a) program. SBA's decision whether to accept the requirement will be transmitted to the contracting office in writing within 10 working days of receipt of the offer if the contract is likely to exceed the simplified acquisition threshold and within two working days of receipt if the contract is at or below the simplified acquisition threshold. The contracting office may grant an extension of these time periods, if requested by SBA.

(1) For acquisitions exceeding the simplified acquisition threshold, if SBA does not respond to an offering letter within ten working days, the

contracting office may seek SBA's acceptance through the Associate Administrator for Business Development. The contracting office may assume that SBA has accepted the requirement into the 8(a) program if it does not receive a reply from the Associate Administrator for Business Development within five calendar days of receipt of the contracting office's request.

(2) For acquisitions not exceeding the simplified acquisition threshold, when the contracting office makes an offer to the 8(a) program on behalf of a specific 8(a) participant and does not receive a reply to its offering letter within two working days, the contracting office may assume the offer is accepted and proceed with award of an 8(a) contract.

(b) As part of the acceptance process, SBA will review the appropriateness of the NAICS code designation assigned to the requirement by the contracting officer.

(1) SBA will not challenge the NAICS code assigned to the requirement by the contracting officer if it is reasonable, even though other NAICS codes may also be reasonable.

(2) If SBA and the contracting officer are unable to agree on a NAICS code designation for the requirement, SBA may refuse to accept the requirement for the 8(a) program, appeal the contracting officer's determination to the head of the agency pursuant to 19.810, or appeal the NAICS code designation to the SBA Office of Hearings and Appeals under subpart C of 13 CFR part 134.

(c) *Sole source 8(a) awards.* If an appropriate match exists, SBA will advise the contracting officer whether it will participate in contract negotiations or whether SBA will authorize the contracting officer to negotiate directly with the identified 8(a) participant. Where SBA has delegated its contract execution functions to a contracting agency, SBA will also identify that delegation in its acceptance letter.

(1) *Sole source award where the contracting officer nominates a specific 8(a) participant.* SBA will determine whether an appropriate match exists where the contracting officer identifies a particular participant for a sole source award.

Federal Acquisition Regulation

19.804-6

(i) Once SBA determines that a procurement is suitable to be accepted as an 8(a) sole source contract, SBA will normally accept it on behalf of the 8(a) participant recommended by the contracting officer, provided that the 8(a) participant complies with the requirements of 13 CFR 124.503(c)(1).

(ii) If an appropriate match does not exist, SBA will notify the 8(a) participant and the contracting officer, and may then nominate an alternate 8(a) participant.

(2) *Sole source award where the contracting officer does not nominate a specific 8(a) participant.* When a contracting officer does not nominate an 8(a) participant for performance of a sole source 8(a) contract, SBA will select an 8(a) participant for possible award from among two or more eligible and qualified 8(a) participants. The selection will be based upon relevant factors, including business development needs, compliance with competitive business mix requirements (if applicable), financial condition, management ability, technical capability, and whether award will promote the equitable distribution of 8(a) contracts. (For construction requirements see 13 CFR 124.503(d)(1)).

[82 FR 4727, Jan. 13, 2017]

19.804-4 Repetitive acquisitions.

In order for repetitive acquisitions to be awarded through the 8(a) program, there must be separate offers and acceptances. This allows the SBA to determine—

(a) Whether the requirement should be a competitive 8(a) award;

(b) A nominated 8(a) participant's eligibility, and whether or not it is the same 8(a) participant that performed the previous contract;

(c) The effect that contract award would have on the equitable distribution of 8(a) contracts; and

(d) Whether the requirement should continue under the 8(a) program.

[64 FR 32744, June 17, 1999, as amended at 82 FR 4728, Jan. 13, 2017]

19.804-5 Basic ordering agreements.

(a) The contracting office shall submit an offering letter for, and SBA must accept, each order under a basic

ordering agreement (BOA) in addition to the agency offering and SBA accepting the BOA itself.

(b) SBA will not accept for award on a sole-source basis any order that would cause the total dollar amount of orders issued under a specific BOA to exceed the competitive threshold amount in 19.805-1.

(c) Once an 8(a) participant's program term expires, the participant otherwise exits the 8(a) program, or becomes other than small for the NAICS code assigned under the BOA, SBA will not accept new orders for the participant.

[64 FR 32744, June 17, 1999, as amended at 65 FR 46057, July 26, 2000; 82 FR 4728, Jan. 13, 2017]

19.804-6 Indefinite-delivery contracts.

(a) Separate offers and acceptances are not required for individual orders under multiple-award contracts (including the Federal Supply Schedules managed by GSA, multi-agency contracts or Governmentwide acquisition contracts, or indefinite-delivery, indefinite-quantity (IDIQ) contracts) that have been set aside for exclusive competition among 8(a) contractors, and the individual order is to be competed among all 8(a) contract holders. SBA's acceptance of the original contract is valid for the term of the contract. Offers and acceptances are required for individual orders under multiple-award contracts that have not been set aside for exclusive competition among 8(a) contractors.

(b) The contracting officer may issue an order on a sole source basis when—

(1) The multiple-award contract was set aside for exclusive competition among 8(a) participants;

(2) The order has an estimated value less than or equal to the dollar thresholds set forth at 19.805-1(a)(2); and

(3) The offering and acceptance procedures at 19.804-2 and 19.804-3 are followed.

(c) The contracting officer may issue an order directly to one 8(a) contractor in accordance with 19.504(c)(1)(ii) when—

(1) The multiple-award contract was reserved for 8(a) participants;

(2) The order has an estimated value less than or equal to \$7 million for acquisitions assigned manufacturing NAICS codes and \$4 million for all other acquisitions; and

(3) The offering and acceptance procedures at 19.804–2 and 19.804–3 are followed.

(d) An 8(a) contractor may continue to accept new orders under the contract, even if it exits the 8(a) program, or becomes other than small for the NAICS code(s) assigned to the contract.

(e) Agencies may continue to take credit toward their prime contracting small disadvantaged business or small business goals for orders awarded to 8(a) contractors, even after the contractor's 8(a) program term expires, the contractor otherwise exits the 8(a) program, or the contractor becomes other than small for the NAICS code(s) assigned under the 8(a) contract. However, if an 8(a) contractor rerepresents that it is other than small for the NAICS code(s) assigned under the contract in accordance with 19.301–2 or, where ownership or control of the 8(a) contractor has changed and SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR 124.515), the agency may not credit any subsequent orders awarded to the contractor towards its small disadvantaged business or small business goals.

[85 FR 11765, Feb. 27, 2020]

19.805 Competitive 8(a).

19.805–1 General.

(a) Except as provided in paragraph (b) of this section, an acquisition offered to the SBA under the 8(a) program shall be awarded on the basis of competition limited to eligible 8(a) participants when—

(1) There is a reasonable expectation that at least two eligible and responsible 8(a) participants will submit offers and that award can be made at a fair market price; and

(2) The anticipated total value of the contract, including options, will exceed \$7 million for acquisitions assigned manufacturing North American Industry Classification System (NAICS)

codes and \$4 million for all other acquisitions.

(b) Where an acquisition exceeds the competitive threshold (see paragraph (a)(2) of this section), the SBA may accept the requirement for a sole source 8(a) award if—

(1) There is not a reasonable expectation that at least two eligible and responsible 8(a) participants will submit offers at a fair market price; or

(2) SBA accepts the requirement on behalf of a concern owned by an Indian tribe or an Alaska Native Corporation.

(c) A proposed 8(a) requirement with an estimated value exceeding the applicable competitive threshold amount shall not be divided into several requirements for lesser amounts in order to use 8(a) sole source procedures for award to a single firm.

(d) The SBA Associate Administrator for Business Development may approve a contracting office's request for a competitive 8(a) award below the competitive thresholds. Such requests will be approved only on a limited basis and will be primarily granted where technical competitions are appropriate or where a large number of responsible 8(a) participants are available for competition. In determining whether a request to compete below the threshold will be approved, the SBA Associate Administrator for Business Development will, in part, consider the extent to which the contracting activity is supporting the 8(a) program on a non-competitive basis. The agency may include recommendations for competition below the threshold in the offering letter or by separate correspondence to the SBA Associate Administrator for Business Development.

[54 FR 46005, Oct. 31, 1989, as amended at 61 FR 67421, Dec. 20, 1996; 64 FR 32744, June 17, 1999; 65 FR 46056, July 26, 2000; 68 FR 4051, Jan. 27, 2003; 69 FR 8314, Feb. 23, 2004; 71 FR 57367, Sept. 28, 2006; 75 FR 53133, Aug. 30, 2010; 75 FR 77730, Dec. 13, 2010; 80 FR 38298, July 2, 2015; 82 FR 4729, Jan. 13, 2017]

19.805–2 Procedures.

(a) Offers shall be solicited from those sources identified in accordance with 19.804–3.

(b) The SBA will determine the eligibility of the participants for award of

Federal Acquisition Regulation

19.808-1

the contract. Eligibility will be determined by the SBA as of the time of submission of initial offers which include price. Eligibility is based on Section 8(a) program criteria. An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(1) In either negotiated or sealed bid competitive 8(a) acquisitions SBA will determine the eligibility of the apparent successful offeror and advise the contracting office within 5 working days after receipt of the contracting office's request for an eligibility determination.

(i) If SBA determines that the apparent successful offeror is ineligible, the contracting office will then send to SBA the identity of the next highest evaluated offeror for an eligibility determination. The process is repeated until SBA determines that an identified offeror is eligible for award.

(ii) If the contracting officer believes that the apparent successful offeror (or the offeror SBA has determined eligible for award) is not responsible to perform the contract, the contracting officer must refer the matter to SBA for Certificate of Competency consideration under subpart 19.6.

(2) In any case in which an 8(a) participant is determined to be ineligible, SBA will notify the 8(a) participant of that determination.

(c) Any party with information questioning the eligibility of an 8(a) participant to continue participation in the 8(a) program or for the purposes of a specific 8(a) award may submit such information to the SBA in accordance with 13 CFR 124.112(c).

[82 FR 4729, Jan. 13, 2017]

19.806 Pricing the 8(a) contract.

(a) The contracting officer shall price the 8(a) contract in accordance with subpart 15.4. If required by subpart 15.4, the SBA shall obtain certified cost or pricing data from the 8(a) contractor. If the SBA requests audit assistance to determine the proposed price to be fair and reasonable in a sole source acquisition, the contracting activity shall furnish it to the extent it is available.

(b) An 8(a) contract, sole source or competitive, may not be awarded if the

price of the contract results in a cost to the contracting agency which exceeds a fair market price.

(c) If requested by the SBA, the contracting officer shall make available the data used to estimate the fair market price within 10 working days.

(d) The negotiated contract price and the estimated fair market price are subject to the concurrence of the SBA. In the event of a disagreement between the contracting officer and the SBA, the SBA may appeal in accordance with 19.810.

[54 FR 46005, Oct. 31, 1989, as amended at 62 FR 51270, Sept. 30, 1997; 64 FR 32745, 32748, June 17, 1999; 75 FR 53149, Aug. 30, 2010]

19.807 Estimating the fair market price.

(a) The contracting officer shall estimate the fair market price of the work to be performed by the 8(a) contractor.

(b) In estimating the fair market price for an acquisition other than those covered in paragraph (c) of this section, the contracting officer shall use cost or price analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including certified cost or pricing data) submitted by the SBA or the 8(a) contractor, and data obtained from any other Government agency.

(c) In estimating a fair market price for a repeat purchase, the contracting officer shall consider recent award prices for the same items or work if there is comparability in quantities, conditions, terms, and performance times. The estimated price should be adjusted to reflect differences in specifications, plans, transportation costs, packaging and packing costs, and other circumstances. Price indices may be used as guides to determine the changes in labor and material costs. Comparison of commercial prices for similar items may also be used.

[54 FR 46005, Oct. 31, 1989, as amended at 75 FR 53149, Aug. 30, 2010]

19.808 Contract negotiation.

19.808-1 Sole source.

(a) The SBA may not accept for negotiation a sole-source 8(a) contract that

19.808-2

exceeds \$22 million unless the requesting agency has completed a justification in accordance with the requirements of 6.303.

(b) The SBA is responsible for initiating negotiations with the agency within the time established by the agency. If the SBA does not initiate negotiations within the agreed time and the agency cannot allow additional time, the agency may, after notifying the SBA, proceed with the acquisition from other sources.

(c) The SBA should participate, whenever practicable, in negotiating the contracting terms. When mutually agreeable, the SBA may authorize the contracting officer to negotiate directly with the 8(a) participant. Whether or not direct negotiations take place, the SBA is responsible for approving the resulting contract before award.

(d) An 8(a) participant must represent that it is a small business in accordance with the size standard corresponding to the NAICS code assigned to the contract.

(e) An 8(a) participant owned by an Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation may not receive an 8(a) sole source award that is a follow-on contract to an 8(a) contract, if the predecessor contract was performed by another 8(a) participant (or former 8(a) participant) owned by the same Alaska Native Corporation, Indian Tribe, Native Hawaiian Organization, or Community Development Corporation (See 13 CFR 124.109 through 124.111).

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990; 56 FR 55378, Oct. 25, 1991; 61 FR 67421, Dec. 20, 1996; 76 FR 14562, Mar. 16, 2011; 80 FR 38298, July 2, 2015; 82 FR 4729, Jan. 13, 2017]

19.808-2 Competitive.

In competitive 8(a) acquisitions subject to part 15, the contracting officer conducts negotiations directly with the competing 8(a) participants. Conducting competitive negotiations among 8(a) participants prior to SBA's formal acceptance of the acquisition for the 8(a) program may be grounds

48 CFR Ch. 1 (10-1-20 Edition)

for SBA's not accepting the acquisition for the 8(a) program.

[82 FR 4729, Jan. 13, 2017]

19.809 Preaward considerations.

19.809-1 Preaward survey.

The contracting officer should request a preaward survey of the 8(a) participant whenever considered useful. If the results of the preaward survey or other information available to the contracting officer raise substantial doubt as to the participant's ability to perform, the contracting officer shall refer the matter to SBA for Certificate of Competency consideration under subpart 19.6.

[85 FR 11765, Feb. 27, 2020]

19.809-2 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under the 8(a) program, the 8(a) participant is required to perform—

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) For general construction, at least 15 percent of the cost with its own employees (not including the cost of materials); and

(4) For construction by special trade contractors, at least 25 percent of the cost with its own employees (not including the cost of materials).

(b) *Compliance period.* An 8(a) contractor is required to comply with the limitations on subcontracting—

(1) For a contract under the 8(a) program, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order competed exclusively among contractors who are 8(a) participants or for an order issued directly to one 8(a) contractor in accordance with

Federal Acquisition Regulation

19.811-1

19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Waiver.* The applicable SBA District Director may waive the provisions in paragraph (b)(1) requiring a participant to comply with the limitations on subcontracting for each period of performance or for each order. Instead, the SBA District Director may permit the participant to subcontract in excess of the limitations on subcontracting where the SBA District Director makes a written determination that larger amounts of subcontracting are essential during certain stages of performance.

(1) The 8(a) participant is required to provide the SBA District Director written assurance that the participant will ultimately comply with the requirements of this section prior to contract completion. The contracting officer shall review the written assurance and inform the 8(a) participant of their concurrence or nonconcurrence. The 8(a) participant can only submit the written assurance to the SBA District Director upon concurrence by the contracting officer.

(2) The contracting officer does not have the authority to waive the provisions of this section requiring an 8(a) participant to comply with the limitations on subcontracting for each period of performance or order, even if the agency has a Partnership Agreement with SBA.

(3) Where the 8(a) participant does not ultimately comply with the limitations on subcontracting by the end of the contract, SBA will not grant future waivers for the 8(a) participant.

(d) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

[85 FR 11765, Feb. 27, 2020]

19.810 SBA appeals.

(a) The SBA Administrator may submit the following matters for determination to the agency head if the SBA and the contracting officer fail to agree on them:

(1) The decision not to make a particular acquisition available for award under the 8(a) Program.

(2) A contracting officer's decision to reject a specific 8(a) participant for

award of an 8(a) contract after SBA's acceptance of the requirement for the 8(a) program.

(3) The terms and conditions of a proposed 8(a) contract, including the contracting officer's NAICS code designation and estimate of the fair market price.

(b)(1) Notification by SBA of an intent to appeal to the agency head—

(i) Must be received by the contracting officer within 5 working days after SBA is formally notified of the contracting officer's decision; and

(ii) Must be provided to the contracting agency Director for the Office of Small and Disadvantaged Business Utilization or, for the Director of the Office of Defense, the Director of the Office of Small Business Programs.

(2) SBA must send the written appeal to the agency head within 15 working days of SBA's notification of intent to appeal or the appeal may be considered withdrawn. Pending issuance of a decision by the agency head, the contracting officer shall suspend action on the acquisition. The contracting officer need not suspend action on the acquisition if the contracting officer makes a written determination that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for a decision.

(c) If the SBA appeal is denied, the decision of the agency head shall specify the reasons for the denial, including the reasons why the selected participant was determined incapable of performance, if appropriate. The decision shall be made a part of the contract file.

[54 FR 46005, Oct. 31, 1989, as amended at 64 FR 32745, June 17, 1999; 65 FR 46057, July 26, 2000, as amended at 82 FR 4729, Jan. 13, 2017; 85 FR 11766, Feb. 27, 2020]

19.811 Preparing the contracts.

19.811-1 Sole source.

(a) The contract to be awarded by the agency to the SBA shall be prepared in accordance with agency procedures and in the same detail as would be required in a contract with a business concern. The contracting officer shall use the Standard Form 26 as the award form, except for construction contracts, in

19.811-2

which case the Standard Form 1442 shall be used as required in 36.701(a).

(b) The contracting officer shall prepare the contract that the SBA will award to the 8(a) participant in accordance with agency procedures, as if awarding the contract directly to the 8(a) participant, except for the following:

(1) The award form shall cite 41 U.S.C. 3304(a)(5) or 10 U.S.C. 2304(c)(5) (as appropriate) as the authority for use of other than full and open competition.

(2) Appropriate clauses shall be included, as necessary, to reflect that the contract is between the SBA and the 8(a) contractor.

(3) The following items shall be inserted by the SBA—

- (i) The SBA contract number.
- (ii) The effective date.
- (iii) The typed name of the SBA's contracting officer.
- (iv) The signature of the SBA's contracting officer.
- (v) The date signed.

(4) The SBA will obtain the signature of the 8(a) contractor prior to signing and returning the prime contract to the contracting officer for signature. The SBA will make every effort to obtain signatures and return the contract, and any subsequent bilateral modification, to the contracting officer within a maximum of 10 working days.

(c) Except in procurements where the SBA will make advance payments to its 8(a) contractor, the agency contracting officer may, as an alternative to the procedures in paragraphs (a) and (b) of this subsection, use a single contract document for both the prime contract between the agency and the SBA and its 8(a) contractor. The single contract document shall contain the information in paragraphs (b) (1), (2), and (3) of this subsection. Appropriate blocks on the Standard Form (SF) 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) Agency acquisition office, prime contract number, name of agency contracting officer and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA contract number, name of the SBA contracting

48 CFR Ch. 1 (10-1-20 Edition)

officer, and lines for signature and date signed.

(3) Name and lines for the 8(a) contractor's signature and date signed.

(d) For acquisitions not exceeding the simplified acquisition threshold, the contracting officer may use the alternative procedures in paragraph (c) of this subsection with the appropriate simplified acquisition forms.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990; 61 FR 67421, Dec. 20, 1996; 62 FR 233, Jan. 2, 1997; 62 FR 64940, Dec. 9, 1997; 64 FR 32745, June 17, 1999; 69 FR 59699, Oct. 5, 2004; 79 FR 24202, Apr. 29, 2014; 82 FR 4729, Jan. 13, 2017]

19.811-2 Competitive.

(a) The contract will be prepared in accordance with 14.408-1(d), except that appropriate blocks on the Standard Form 26 or 1442 will be asterisked and a continuation sheet appended as a tripartite agreement which includes the following:

(1) The agency contracting activity, prime contract number, name of agency contracting officer, and lines for signature, date signed, and effective date.

(2) The SBA office, the SBA sub-contract number, name of the SBA contracting officer and lines for signature and date signed.

(b) The process for obtaining signatures shall be as specified in 19.811-1(b)(4).

[54 FR 46005, Oct. 31, 1989, as amended at 60 FR 34739, July 3, 1995; 62 FR 233, Jan. 2, 1997; 64 FR 32745, June 17, 1999]

19.811-3 Contract clauses.

(a) The contracting officer shall insert the clause at 52.219-11, Special 8(a) Contract Conditions, in contracts between the SBA and the agency when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(b) The contracting officer shall insert the clause at 52.219-12, Special 8(a) Subcontract Conditions, in contracts between the SBA and its 8(a) contractor when the acquisition is accomplished using the procedures of 19.811-1(a) and (b).

(c) The contracting officer shall insert the clause at 52.219-17, Section 8(a) Award, in competitive solicitations and

contracts when the acquisition is accomplished using the procedures of 19.805 and in sole source awards which utilize the alternative procedure in 19.811-1(c).

(d) The contracting officer shall insert the clause at 52.219-18, Notification of Competition Limited to Eligible 8(a) Participants, in competitive solicitations and contracts when the acquisition is accomplished using the procedures of 19.805. The clause at 52.219-18 with its Alternate I shall be used when competition is to be limited to 8(a) participants within one or more specific SBA districts pursuant to 19.804-2.

(e) For contracts or orders resulting from this subpart, see 19.507(e) for use of 52.219-14, Limitations on Subcontracting, and 19.507(h) for use of 52.219-33, Nonmanufacturer Rule.

[54 FR 46005, Oct. 31, 1989, as amended at 55 FR 3883, Feb. 5, 1990; 55 FR 25529, June 21, 1990; 60 FR 48263, Sept. 18, 1995; 61 FR 39209, July 26, 1996; 61 FR 67421, Dec. 20, 1996; 76 FR 68035, Nov. 2, 2011; 82 FR 4730, Jan. 13, 2017; 85 FR 11766, Feb. 27, 2020]

19.812 Contract administration.

(a) The contracting officer shall assign contract administration functions, as required, based on the location of the 8(a) contractor (see Federal Directory of Contract Administration Services Components (available via the Internet at <https://pubapp.dema.mil/CASD/main.jsp>)).

(b) The agency shall distribute copies of the contract(s) in accordance with part 4. All contracts and modifications, if any, shall be distributed to both the SBA and the 8(a) contractor in accordance with the timeframes set forth in 4.201.

(c) To the extent consistent with the contracting activity's capability and resources, 8(a) contractors furnishing requirements shall be afforded production and technical assistance, including, when appropriate, identification of causes of deficiencies in their products and suggested corrective action to make such products acceptable.

(d) An 8(a) contract, whether in the base or an option year, must be terminated for convenience if the 8(a) contractor to which it was awarded transfers ownership or control of the firm or if the contract is transferred or

novated for any reason to another firm, unless the Administrator of the SBA waives the requirement for contract termination (13 CFR 124.515). The Administrator may waive the termination requirement only if certain conditions exist. Moreover, a waiver of the requirement for termination is permitted only if the 8(a) contractor's request for waiver is made to the SBA prior to the actual relinquishment of ownership or control, except in the case of death or incapacity where the waiver must be submitted within 60 calendar days after such an occurrence. The clauses in the contract entitled "Special 8(a) Contract Conditions" and "Special 8(a) Subcontract Conditions" require the SBA and the 8(a) subcontractor to notify the contracting officer when ownership of the firm is being transferred. When the contracting officer receives information that an 8(a) contractor is planning to transfer ownership or control to another firm, the contracting officer shall take action immediately to preserve the option of waiving the termination requirement. The contracting officer shall determine the timing of the proposed transfer and its effect on contract performance and mission support. If the contracting officer determines that the SBA does not intend to waive the termination requirement, and termination of the contract would severely impair attainment of the agency's program objectives or mission, the contracting officer shall immediately notify the SBA in writing that the agency is requesting a waiver. Within 15 business days thereafter, or such longer period as agreed to by the agency and the SBA, the agency head must either confirm or withdraw the request for waiver. Unless a waiver is approved by the SBA, the contracting officer must terminate the contract for convenience upon receipt of a written request by the SBA. This requirement for a convenience termination does not affect the Government's right to terminate for default if the cause for termination of an 8(a) contract is other than the transfer of ownership or control.

[54 FR 46005, Oct. 31, 1989, as amended at 56 FR 15151, Apr. 15, 1991; 64 FR 32745, June 17, 1999; 66 FR 2141, Jan. 10, 2001; 77 FR 12949, Mar. 2, 2012; 82 FR 4730, Jan. 13, 2017]

19.813 Protesting an 8(a) participant's eligibility or size status.

(a) The eligibility of an 8(a) participant for a sole source or competitive 8(a) requirement may not be challenged by another 8(a) participant or any other party, either to SBA or any administrative forum as part of a bid or other contract protest (see 13 CFR 124.517).

(b) The size status of an 8(a) participant nominated for an 8(a) sole source contract may not be protested by another 8(a) participant or any other party.

(c) The size status of the apparent successful offeror for competitive 8(a) awards may be protested. The filing of a size status protest is limited to—

(1) Any offeror whom the contracting officer has not eliminated for reasons unrelated to size;

(2) The contracting officer; or

(3) The SBA District Director in either the district office serving the geographical area in which the contracting activity is located or the district office that services the apparent successful offeror, or the Associate Administrator for Business Development.

(d) Protests of competitive 8(a) awards shall follow the procedures at 19.302. For additional information, refer to 13 CFR 121.1001.

[82 FR 4730, Jan. 13, 2017]

19.814 Requesting a formal size determination (8(a) sole source requirements).

(a) If the size status of an 8(a) participant nominated for award of an 8(a) sole source contract is called into question, a request for a formal size determination may be submitted to SBA pursuant to 13 CFR 121.1001(b)(2)(ii) by—

(1) The 8(a) participant nominated for award of the particular sole source contract;

(2) The contracting officer who has been delegated SBA's 8(a) contract execution functions, where applicable, or the SBA program official with authority to execute the 8(a) contract;

(3) The SBA District Director in the district office that services the 8(a) participant or the Associate Administrator for Business Development; or

(4) The SBA Inspector General.

(b) SBA's Government Contracting Area Director will issue a formal size determination within 15 business days, if possible, after SBA receives the request for a formal size determination.

(c) An appeal of an SBA size determination shall follow the procedures at 19.302.

[82 FR 4730, Jan. 13, 2017]

19.815 Release for non-8(a) procurement.

(a) Once a requirement has been accepted by SBA into the 8(a) program, any follow-on requirements shall remain in the 8(a) program unless there is a mandatory source (see 8.002 or 8.003) or SBA agrees to release the requirement from the 8(a) program in accordance with 13 CFR 124.504(d).

(b) To obtain release of a requirement for a non-8(a) procurement (other than a mandatory source listed at 8.002 or 8.003), the contracting officer shall make a written request to, and receive concurrence from, the SBA Associate Administrator for Business Development.

(c)(1) The written request to the SBA Associate Administrator for Business Development shall indicate—

(i) Whether the agency has achieved its small disadvantaged business goal;

(ii) Whether the agency has achieved its HUBZone, SDVOSB, WOSB, or small business goal(s); and

(iii) Whether the requirement is critical to the business development of the 8(a) contractor that is currently performing the requirement.

(2) Generally, a requirement that was previously accepted into the 8(a) program will only be released for procurements outside the 8(a) program when the contracting activity agency agrees to set aside the requirement under the small business, HUBZone, SDVOSB, or WOSB programs.

(3) The requirement that a follow-on procurement must be released from the 8(a) program in order for it to be fulfilled outside the 8(a) program does not apply to task or delivery orders offered to and accepted into the 8(a) program, where the basic contract was not accepted into the 8(a) program.

[82 FR 4730, Jan. 13, 2017]

Federal Acquisition Regulation

19.1304

19.816 Exiting the 8(a) program.

(a) Except as provided in paragraph (c) of this section, when a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts. However, the contractor remains under contractual obligation to complete existing contracts, and any priced options that may be exercised.

(b) If an 8(a) contractor is suspended from the program (see 13 CFR 124.305), it may not receive any new 8(a) contracts unless the head of the contracting agency makes a determination that it is in the best interest of the Government to issue the award and SBA adopts that determination.

(c) A contractor that has completed its term of participation in the 8(a) program may be awarded a competitive 8(a) contract if it was an 8(a) participant eligible for award of the contract on the initial date specified for receipt of offers contained in the solicitation, and if the contractor continues to meet all other applicable eligibility criteria.

(d) SBA's regulations on exiting the 8(a) program are found at 13 CFR 124.301 through 124.305, and 13 CFR 124.507(d).

[82 FR 4730, Jan. 13, 2017]

Subparts 19.9–19.12 [Reserved]

Subpart 19.13—Historically Underutilized Business Zone (HUBZone) Program

AUTHORITY: 41 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 63 FR 70272, Dec. 18, 1998, unless otherwise noted.

19.1301 General.

(a) The Historically Underutilized Business Zone (HUBZone) Act of 1997 (15 U.S.C. 631 note) created the HUBZone Program.

(b) The purpose of the HUBZone Program is to provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones, in an effort to increase employment opportunities, in-

vestment, and economic development in those areas.

[48 FR 42240, Sept. 19, 1983, as amended at 75 FR 77730, Dec. 13, 2010]

19.1302 Applicability.

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

[67 FR 13066, Mar. 20, 2002]

19.1303 Status as a HUBZone small business concern.

(a) Status as a HUBZone small business concern is determined by the Small Business Administration (SBA) in accordance with 13 CFR part 126.

(b) If the SBA determines that a concern is a HUBZone small business concern, it will issue a certification to that effect and will add the concern to the List of Qualified HUBZone Small Business Concerns at http://dsbs.sba.gov/dsbs/search/dsp_searchhubzone.cfm.

Only firms on the list are HUBZone small business concerns, eligible for HUBZone preferences. HUBZone preferences apply without regard to the place of performance. Information on HUBZone small business concerns can also be obtained at <http://www.sba.gov/hubzone> or by writing to the Director for the HUBZone Program (Director/HUB) at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416 or at hubzone@sba.gov.

(c) A joint venture may be considered a HUBZone small business concern if it meets the criteria in 13 CFR 121.103(h).

(d) To be eligible for a HUBZone contract under this section, a HUBZone small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award.

[63 FR 70272, Dec. 18, 1998, as amended at 64 FR 51832, Sept. 24, 1999; 75 FR 77730, Dec. 13, 2010; 84 FR 47864, Sept. 10, 2019; 85 FR 11766, Feb. 27, 2020]

19.1304 Exclusions.

This subpart does not apply to—

(a) Requirements that can be satisfied through award to—

(1) Federal Prison Industries, Inc. (see subpart 8.6); or

(2) AbilityOne participating non-profit agencies for the blind or severely disabled (see subpart 8.7);

(b) Orders under indefinite-delivery contracts (see subpart 16.5). (But see 16.505(b)(2)(i)(F) for discretionary set-asides of orders);

(c) Orders against Federal Supply Schedules (see subpart 8.4). (But see 8.405–5 for discretionary set-asides of orders);

(d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program;

(e) Requirements that do not exceed the micro-purchase threshold; or

(f) Requirements for commissary or exchange resale items.

[63 FR 70272, Dec. 18, 1998, as amended at 76 FR 68035, Nov. 2, 2011; 79 FR 24202, Apr. 29, 2014; 82 FR 4731, Jan. 13, 2017]

19.1305 HUBZone set-aside procedures.

(a) The contracting officer—

(1) Shall comply with 19.203 before deciding to set aside an acquisition under the HUBZone Program;

(2) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to HUBZone small business concerns when the requirements of paragraph (b) of this section can be satisfied; and

(3) Shall consider HUBZone set-asides before considering HUBZone sole source awards (see 19.1306) or small business set-asides (see subpart 19.5).

(b) To set aside an acquisition for competition restricted to HUBZone small business concerns, the contracting officer must have a reasonable expectation that—

(1) Offers will be received from two or more HUBZone small business concerns; and

(2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from a qualified HUBZone small business concern in response to a set aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from

HUBZone small business concerns, the HUBZone set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see 19.203).

(d) The procedures at 19.202–1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section.

(1) When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to HUBZone small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 business days of receiving the contracting officer's notice of rejection.

(2) Upon receipt of notice of SBA's intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist.

(3) Within 15 business days of SBA's notification to the contracting officer, SBA must file its formal appeal with the head of the agency, or the appeal will be deemed withdrawn. The head of the agency shall reply to SBA within 15 business days of receiving the appeal. The decision of the head of the agency shall be final.

[63 FR 70272, Dec. 18, 1998, as amended at 71 FR 36927, June 28, 2006; 75 FR 77730, Dec. 13, 2010; 76 FR 14568, Mar. 16, 2011; 77 FR 12932, Mar. 2, 2012]

19.1306 HUBZone sole source awards.

(a) A contracting officer shall consider a contract award to a HUBZone small business concern on a sole source basis (see 6.302–5(b)(5)) before considering a small business set-aside (see 19.203 and subpart 19.5), provided none of the exclusions at 19.1304 apply; and—

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more HUBZone small business concerns;

(2) The anticipated price of the contract, including options, will not exceed—

(i) \$7 million for a requirement within the North American Industry Classification System (NAICS) codes for manufacturing; or

(ii) \$4 million for a requirement within all other NAICS codes;

(3) The requirement is not currently being performed by an 8(a) participant under the provisions of subpart 19.8 or has been accepted as a requirement by SBA under subpart 19.8.

(4) The acquisition is greater than the simplified acquisition threshold (see part 13);

(5) The HUBZone small business concern has been determined to be a responsible contractor with respect to performance; and

(6) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make a HUBZone sole source award.

[63 FR 70272, Dec. 18, 1998, as amended at 65 FR 46057, July 26, 2000; 68 FR 4051, Jan. 27, 2003; 69 FR 8315, Feb. 23, 2004; 71 FR 57367, Sept. 28, 2006; 75 FR 38688, July 2, 2010; 75 FR 53133, Aug. 30, 2010; 75 FR 77731, Dec. 13, 2010; 76 FR 14568, Mar. 16, 2011; 77 FR 12932, Mar. 2, 2012; 80 FR 38298, July 2, 2015]

19.1307 Price evaluation preference for HUBZone small business concerns.

(a) The price evaluation preference for HUBZone small business concerns shall be used in acquisitions conducted using full and open competition. The preference shall not be used—

(1) Where price is not a selection factor so that a price evaluation preference would not be considered (e.g., Architect/Engineer acquisitions);

(2) Where all fair and reasonable offers are accepted (e.g., the award of multiple award schedule contracts); or

(3) For the reserved portion of a solicitation for a multiple-award contract (see 19.503).

(b) The contracting officer shall give offers from HUBZone small business concerns a price evaluation preference by adding a factor of 10 percent to all offers, except—

(1) Offers from HUBZone small business concerns that have not waived the evaluation preference; or

(2) Otherwise successful offers from small business concerns.

(c) The factor of 10 percent shall be applied on a line item basis or to any group of items on which award may be made. Other evaluation factors, such as transportation costs or rent-free use of Government property, shall be added to the offer to establish the base offer before adding the factor of 10 percent.

(d) When the two highest rated offerors are a HUBZone small business concern and a large business, and the evaluated offer of the HUBZone small business concern is equal to the evaluated offer of the large business after considering the price evaluation preference, the contracting officer shall award the contract to the HUBZone small business concern.

[63 FR 70272, Dec. 18, 1998, as amended at 64 FR 72419, Dec. 27, 1999; 69 FR 1053, Jan. 7, 2004; 70 FR 33661, June 8, 2005; 72 FR 27384, May 15, 2007; 75 FR 77731, Dec. 13, 2010; 79 FR 61751, Oct. 14, 2014; 85 FR 11766, Feb. 27, 2020]

19.1308 Limitations on subcontracting and nonmanufacturer rule.

(a) *Definitions.* See 13 CFR 125.1 for definitions of terms used in paragraph (b) of this section.

(b) *Limitations on subcontracting.* To be awarded a contract or order under the HUBZone program, the HUBZone small business concern is required—

(1) For services (except construction), to spend at least 50 percent of the cost of performance incurred for personnel on its own employees or on the employees of other HUBZone small business concerns;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), to spend at least 50 percent of the cost of manufacturing, excluding the cost of materials, performed by the concern or other HUBZone small business concerns;

(3) For general construction—

(i) To spend at least 15 percent of the cost of performance incurred for personnel on its own employees; and

(ii) To spend at least 50 percent of the cost of performance incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors; or

(4) For construction by special trade contractors—

(i) To spend at least 25 percent of the cost of contract performance incurred for personnel on its own employees; and

(ii) To spend at least 50 percent of the cost of the contract incurred for personnel on its own employees or on a combination of its own employees and employees of HUBZone small business concern subcontractors.

(c) *Construction.* Before issuing a solicitation for general construction or construction by special trade contractors, the contracting officer shall determine if at least two HUBZone small business concerns can spend at least 50 percent of the cost of contract performance to be incurred for personnel on their own employees or subcontract employees of other HUBZone small business concerns. If the contracting officer is unable to make this determination, the contracting officer may waive the 50 percent requirement; however, the HUBZone small business concern is still required to meet the cost incurred for personnel requirements in paragraphs (b)(3)(i) and (b)(4)(i).

(d) *Compliance period.* A HUBZone small business contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis to a HUBZone small business concern, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or for an order issued directly to a HUBZone small business contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(e) *Nonmanufacturer rule.* (1) To be awarded a contract or order for supplies as a nonmanufacturer under this subpart, a contractor is required—

(i) To provide the end item of a HUBZone small business manufacturer, that has been manufactured or pro-

duced in the United States or its outlying areas;

(ii) Not to exceed 500 employees;

(iii) To be primarily engaged in the retail or wholesale trade and normally sell the type of item being supplied; and

(iv) To take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.

(2) There are no class waivers or waivers to the nonmanufacturer rule for individual solicitations for contracts and orders awarded under the HUBZone Program.

(3) For contracts and orders awarded under the HUBZone Program at or below \$25,000 in total value, a HUBZone small business concern may supply the end item of any manufacturer, including a large business, as long as the product acquired is manufactured or produced in the United States.

[85 FR 11766, Feb. 27, 2020]

19.1309 Contract clauses.

(a)(1) The contracting officer shall insert the clause 52.219–3, Notice of HUBZone Set-Aside or Sole Source Award, in solicitations and contracts for acquisitions that are set aside or awarded on a sole source basis to, HUBZone small business concerns under 19.1305 or 19.1306. This includes multiple-award contracts when orders may be set aside for HUBZone small business concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one HUBZone small business concern in accordance with 19.504(c)(1)(ii).

(2) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(c) apply.

(b)(1) The contracting officer shall insert the clause at 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, in solicitations and contracts for acquisitions conducted using full and open competition.

(2) The contracting officer shall use the clause with its Alternate I to waive the 50 percent requirement if the conditions at 19.1308(c) apply.

Federal Acquisition Regulation

19.1405

(c) For use of clause 52.219–33, Non-manufacturer Rule, see the prescription at 19.507(h)(2).

[85 FR 11767, Feb. 27, 2020]

Subpart 19.14—Service-Disabled Veteran-Owned Small Business Procurement Program

SOURCE: 69 FR 25278, May 5, 2004, unless otherwise noted.

19.1401 General.

(a) The Veterans Benefit Act of 2003 (15 U.S.C. 657f) created the procurement program for small business concerns owned and controlled by service-disabled veterans (commonly referred to as the “Service-Disabled Veteran-owned Small Business (SDVOSB) Procurement Program”).

(b) The purpose of the Service-Disabled Veteran-Owned Small Business Program is to provide Federal contracting assistance to service-disabled veteran-owned small business concerns.

19.1402 Applicability.

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

19.1403 Status as a service-disabled veteran-owned small business concern.

(a) Status as a service-disabled veteran-owned small business concern is determined in accordance with 13 CFR parts 125.8 through 125.13; also see 19.307.

(b) At the time that a service-disabled veteran-owned small business concern submits its offer, it must represent to the contracting officer that it is a—

(1) Service-disabled veteran-owned small business concern; and

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the procurement.

(c) A joint venture may be considered a service-disabled veteran owned small business concern if—

(1) At least one member of the joint venture is a service-disabled veteran-owned small business concern, and

makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements in 13 CFR 121.103(h); and

(4) The joint venture meets the requirements of 13 CFR 125.15(b).

(d) Any service-disabled veteran-owned small business concern (non-manufacturer) is required to meet the requirements in 19.1407(c) to receive a benefit under this program.

[69 FR 25278, May 5, 2004, as amended at 84 FR 47864, Sept. 10, 2019; 85 FR 11767, Feb. 27, 2020]

19.1404 Exclusions.

This subpart does not apply to—

(a) Requirements that can be satisfied through award to—

(1) Federal Prison Industries, Inc. (*see* Subpart 8.6);

(2) AbilityOne participating non-profit agencies for the blind or severely disabled (*see* Subpart 8.7);

(b) Orders under indefinite-delivery contracts (*see* subpart 16.5). (But see 16.505(b)(2)(i)(F) for discretionary set-asides of orders);

(c) Orders against Federal Supply Schedules (*see* subpart 8.4). (But see 8.405–5 for discretionary set-asides of orders); or

(d) Requirements currently being performed by an 8(a) participant or requirements SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program.

[69 FR 25278, May 5, 2004, as amended at 70 FR 14955, Mar. 23, 2005; 76 FR 68035, Nov. 2, 2011; 79 FR 24202, Apr. 29, 2014; 82 FR 4731, Jan. 13, 2017]

19.1405 Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer—

(1) Shall comply with 19.203 before deciding to set aside an acquisition under the SDVOSB Program;

(2) May set-aside acquisitions exceeding the micro-purchase threshold for

19.1406

competition restricted to SDVOSB concerns when the requirements of paragraph (b) of this section can be satisfied; and

(3) Shall consider SDVOSB set-asides before considering SDVOSB sole source awards (see 19.1406) or small business set-asides (see subpart 19.5).

(b) To set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the contracting officer must have a reasonable expectation that—

(1) Offers will be received from two or more service-disabled veteran-owned small business concerns; and

(2) Award will be made at a fair market price.

(c) If the contracting officer receives only one acceptable offer from a service-disabled veteran-owned small business concern in response to a set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from service-disabled veteran-owned small business concerns, the service-disabled veteran-owned set-aside shall be withdrawn and the requirement, if still valid, set aside for small business concerns, as appropriate (see 19.203).

(d) The procedures at 19.202-1 and, except for acquisitions not exceeding the simplified acquisition threshold, at 19.402 apply to this section. When the SBA intends to appeal a contracting officer's decision to reject a recommendation of the SBA procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) to set aside an acquisition for competition restricted to service-disabled veteran-owned small business concerns, the SBA procurement center representative shall notify the contracting officer, in writing, of its intent within 5 working days of receiving the contracting officer's notice of rejection. Upon receipt of notice of SBA's intent to appeal, the contracting officer shall suspend action on the acquisition unless the head of the contracting activity makes a written determination that urgent and compelling circumstances, which significantly affect the interests of the Government, exist. Within 15 working days of SBA's notification to the contracting officer,

48 CFR Ch. 1 (10-1-20 Edition)

SBA shall file its formal appeal with the head of the contracting activity, or that agency may consider the appeal withdrawn. The head of the contracting activity shall reply to SBA within 15 working days of receiving the appeal. The decision of the head of the contracting activity shall be final.

[69 FR 25278, May 5, 2004, as amended at 71 FR 36927, June 28, 2006; 76 FR 14568, Mar. 16, 2011; 77 FR 12932, Mar. 2, 2012]

19.1406 Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer shall consider a contract award to a SDVOSB concern on a sole source basis (see 6.302-5(b)(6)), before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions of 19.1404 apply and—

(1) The contracting officer does not have a reasonable expectation that offers would be received from two or more service-disabled veteran-owned small business concerns;

(2) The anticipated award price of the contract, including options, will not exceed—

(i) \$6.5 million for a requirement within the NAICS codes for manufacturing; or

(ii) \$4 million for a requirement within any other NAICS code;

(3) The requirement is not currently being performed by an 8(a) participant under the provisions of subpart 19.8 or has been accepted as a requirement by SBA under subpart 19.8;

(4) The service-disabled veteran-owned small business concern has been determined to be a responsible contractor with respect to performance; and

(5) Award can be made at a fair and reasonable price.

(b) The SBA has the right to appeal the contracting officer's decision not to make a service-disabled veteran-owned small business sole source award.

[69 FR 25278, May 5, 2004, as amended at 71 FR 57367, Sept. 28, 2006; 75 FR 38688, July 2, 2010; 75 FR 53133, Aug. 30, 2010; 76 FR 14568, Mar. 16, 2011; 77 FR 12933, Mar. 2, 2012; 80 FR 38298, July 2, 2015]

Federal Acquisition Regulation

19.1501

19.1407 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under this subpart, the SDVOSB concern is required to—

(1) For services (except construction), spend at least 50 percent of the cost incurred for personnel on its own employees or the employees of other SDVOSBs;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), spend at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials) on itself or by other SDVOSBs;

(3) For general construction, spend at least 15 percent of the cost (not including the cost of materials) incurred for personnel on its own employees or the employees of other SDVOSBs; or

(4) For construction by special trade contractors, spend at least 25 percent of the cost (not including the cost of materials) incurred for personnel on its own employees or the employees of other SDVOSBs.

(b) *Compliance period.* An SDVOSB contractor is required to comply with the limitations on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis to an SDVOSB concern, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside for SDVOSB contractors as described in 8.405-5 and 16.505(b)(2)(i)(F) or for an order issued directly to an SDVOSB contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

[85 FR 11767, Feb. 27, 2020]

19.1408 Contract clause.

The contracting officer shall insert the clause 52.219-27, Notice of Service-Disabled Veteran-Owned Small Busi-

ness Set-Aside, in solicitations and contracts for acquisitions that are set aside or awarded on a sole source basis to, service-disabled veteran-owned small business concerns under 19.1405 and 19.1406. This includes multiple-award contracts when orders may be set aside for service-disabled veteran-owned small business concerns as described in 8.405-5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one service-disabled veteran-owned small business contractor in accordance with 19.504(c)(1)(ii). For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

[85 FR 11767, Feb. 27, 2020]

Subpart 19.15—Women-Owned Small Business Program

SOURCE: 76 FR 18311, Apr. 1, 2011, unless otherwise noted.

19.1500 General.

(a) Section 8(m) of the Small Business Act (15 U.S.C. 637(m)) created the Women-Owned Small Business (WOSB) Program.

(b) The purpose of the WOSB Program is to ensure women-owned small business concerns have an equal opportunity to participate in Federal contracting and to assist agencies in achieving their women-owned small business participation goals (see 13 part CFR 127).

(c) An economically disadvantaged women-owned small business (EDWOSB) concern or WOSB concern eligible under the WOSB Program is a subcategory of “women-owned small business concern” as defined in 2.101.

[76 FR 18311, Apr. 1, 2011, as amended at 77 FR 12917, Mar. 2, 2012]

19.1501 Definition.

WOSB Program Repository means a secure, Web-based application that collects, stores, and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under the WOSB Program.

19.1502 Applicability.

The procedures in this subpart apply to all Federal agencies that employ one or more contracting officers.

19.1503 Status.

(a) Status as an EDWOSB concern or WOSB concern eligible under the WOSB Program is determined in accordance with 13 CFR part 127.

(b) The contracting officer shall verify that the offeror—

(1) Is registered in the System for Award Management (SAM);

(2) Is self-certified as an EDWOSB or WOSB concern in SAM; and

(3) Has submitted documents verifying its eligibility at the time of initial offer to the WOSB Program Repository. The contract shall not be awarded until all required documents are received.

(c)(1) An EDWOSB concern or WOSB concern eligible under the WOSB Program that has been certified by a SBA approved third party certifier, (which includes SBA certification under the 8(a) Program), must provide the following eligibility requirement documents—

(i) The third-party certification;

(ii) SBA's WOSB Program Certification form (SBA Form 2413 for WOSB concerns eligible under the WOSB Program and SBA Form 2414 for EDWOSB concerns); and

(iii) The joint venture agreement, if applicable.

(2) An EDWOSB concern or WOSB concern eligible under the WOSB Program that has not been certified by an SBA approved third party certifier or by SBA under the 8(a) Program, must provide the following documents:

(i) The U.S. birth certificate, naturalization documentation, or unexpired U.S. passport for each woman owner.

(ii) The joint venture agreement, if applicable.

(iii) For limited liability companies, Articles of organization (also referred to as certificate of organization or articles of formation) and any amendments, and the operating agreement and any amendments.

(iv) For corporations, articles of incorporation and any amendments, by-laws and any amendments, all issued stock certificates, including the front

and back copies, signed in accord with the by-laws, stock ledger, and voting agreements, if any.

(v) For partnerships, the partnership agreement and any amendments.

(vi) For sole proprietorships, corporations, limited liability companies and partnerships if applicable, the assumed/fictitious name certificate(s).

(vii) SBA's WOSB Program Certification form (SBA Form 2413 for WOSB concerns eligible under the WOSB Program and SBA Form 2414 for EDWOSB concerns).

(viii) For EDWOSB concerns, in addition to the above, the SBA Form 413, Personal Financial Statement, available to the public at <https://www.sba.gov/managing-business/forms/small-business-forms/financial-assistance-forms/personal-financial-statement>, for each woman claiming economic disadvantage.

(d)(1) A contracting officer may accept a concern's self-certification as accurate for a specific procurement reserved for award under this subpart if—

(i) The apparent successful WOSB eligible under the WOSB Program or EDWOSB offeror provided the required documents;

(ii) There has been no protest or other credible information that calls into question the concern's eligibility as an EDWOSB concern or WOSB concern eligible under the WOSB Program; and

(iii) There has been no decision issued by SBA as a result of a current eligibility examination finding the concern did not qualify as an EDWOSB concern or WOSB concern eligible under the WOSB Program at the time it submitted its initial offer.

(2) The contracting officer shall file a status protest in accordance with 19.308 if—

(i) There is information that questions the eligibility of a concern; or

(ii) The concern fails to provide all of the required documents to verify its eligibility.

(e) If there is a decision issued by SBA as a result of a current eligibility examination finding that the concern did not qualify as an EDWOSB concern or WOSB concern eligible under the WOSB Program, the contracting officer may terminate the contract, and shall

Federal Acquisition Regulation

19.1505

not exercise any option nor award further task or delivery orders. The contracting officer shall not count or include the award toward the small business accomplishments for an EDWOSB concern or WOSB concern eligible under the WOSB Program and must update FPDS from the date of award.

(f) A joint venture may be considered an EDWOSB concern or WOSB concern eligible under the WOSB Program if it meets the requirements of 13 CFR 127.506.

[77 FR 12917, Mar. 2, 2012, as amended at 78 FR 37679, June 21, 2013; 83 FR 42573, Aug. 22, 2018; 85 FR 11767, Feb. 27, 2020]

19.1504 Exclusions.

This subpart does not apply to—

(a) Requirements that an 8(a) contractor is currently performing under the 8(a) program or that SBA has accepted for performance under the authority of the 8(a) program, unless SBA has consented to release the requirements from the 8(a) program;

(b) Requirements that can be satisfied through award to—

(1) Federal Prison Industries, Inc. (see subpart 8.6); or

(2) AbilityOne participating non-profit agencies for the blind or severely disabled (see subpart 8.7);

(c) Orders under indefinite-delivery contracts (see subpart 16.5). (But see 16.505(b)(2)(i)(F) for discretionary set-asides of orders); or

(d) Orders against Federal Supply Schedules (see subpart 8.4). (But see 8.405–5 for discretionary set-asides of orders.)

[76 FR 18311, Apr. 1, 2011, as amended at 76 FR 68036, Nov. 2, 2011; 79 FR 24202, Apr. 29, 2014; 82 FR 4731, Jan. 13, 2017]

19.1505 Set-aside procedures.

(a) The contracting officer—

(1) Shall comply with 19.203 before deciding to set aside an acquisition under the WOSB Program; and

(2) May set aside acquisitions exceeding the micro-purchase threshold for competition restricted to EDWOSB concerns or WOSB concerns eligible under the WOSB Program when the acquisition—

(i) Is assigned a NAICS code in which SBA has determined that WOSB con-

cerns are underrepresented in Federal procurement; or

(ii) Is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement, as specified on SBA's Web site at <http://www.sba.gov/WOSB>.

(b) For requirements in NAICS codes designated by SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns if the contracting officer has a reasonable expectation based on market research that—

(1) Two or more EDWOSB concerns will submit offers for the contract; and

(2) Contract award will be made at a fair and reasonable price.

(c) A contracting officer may restrict competition to WOSB concerns eligible under the WOSB Program (including EDWOSB concerns), for requirements in NAICS codes designated by SBA as substantially underrepresented if there is a reasonable expectation based on market research that—

(1) Two or more WOSB concerns eligible under the WOSB Program (including EDWOSB concerns), will submit offers; and

(2) Contract award may be made at a fair and reasonable price.

(d) The contracting officer may make an award, if only one acceptable offer is received from a qualified EDWOSB concern or WOSB concern eligible under the WOSB Program.

(e) The contracting officer must check whether the apparently successful offeror filed all the required eligibility documents, and file a status protest if any documents are missing. *See* 19.1503(d)(2).

(f) If no acceptable offers are received from an EDWOSB concern or WOSB concern eligible under the WOSB Program, the set-aside shall be withdrawn and the requirement, if still valid, must be considered for set aside in accordance with 19.203 and subpart 19.5.

(g) If the contracting officer rejects a recommendation by SBA's Procurement Center Representative—

(1) The contracting officer shall notify the procurement center representative as soon as practicable;

(2) SBA shall notify the contracting officer of its intent to appeal the contracting officer's decision no later than five business days after receiving notice of the contracting officer's decision;

(3) The contracting officer shall suspend further action regarding the procurement until the head of the agency issues a written decision on the appeal, unless the head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract;

(4) Within 15 business days of SBA's notification to the head of the contracting activity, SBA shall file a formal appeal to the head of the agency, or the appeal will be determined withdrawn; and

(5) The head of the agency, or designee, shall specify in writing the reasons for a denial of an appeal brought under this section.

[76 FR 18311, Apr. 1, 2011, as amended at 77 FR 12917, Mar. 2, 2012; 78 FR 37694, June 21, 2013; 80 FR 81891, Dec. 31, 2015; 81 FR 67736, Sept. 30, 2016]

19.1506 Women-Owned Small Business Program sole source awards.

(a) A contracting officer shall consider a contract award to an EDWOSB concern on a sole source basis (see 6.302–5(b)(7)) before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions at 19.1504 apply and—

(1) The acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are underrepresented in Federal procurement;

(2) The contracting officer does not have a reasonable expectation that offers would be received from two or more EDWOSB concerns; and

(3) The conditions in paragraph (c) of this section exist.

(b) A contracting officer shall consider a contract award to a WOSB concern (including EDWOSB concerns) eligible under the WOSB Program on a sole source basis (see 6.302–5(b)(7)) before considering small business set-asides (see 19.203 and subpart 19.5) provided none of the exclusions at 19.1504 apply and—

(1) The acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement;

(2) The contracting officer does not have a reasonable expectation that offers would be received from two or more WOSB concerns (including EDWOSB concerns); and

(3) The conditions in paragraph (c) of this section exist.

(c)(1) The anticipated award price of the contract, including options, will not exceed—

(i) \$6.5 million for a requirement within the NAICS codes for manufacturing; or

(ii) \$4 million for a requirement within any other NAICS codes.

(2) The EDWOSB concern or WOSB concern has been determined to be a responsible contractor with respect to performance.

(3) The award can be made at a fair and reasonable price.

(d) The SBA has the right to appeal the contracting officer's decision not to make a sole source award to either an EDWOSB concern or WOSB concern eligible under the WOSB program.

[81 FR 83103, Nov. 18, 2016]

19.1507 Limitations on subcontracting and nonmanufacturer rule.

(a) *Limitations on subcontracting.* To be awarded a contract or order under the WOSB Program, the contractor is required to perform—

(1) For services (except construction), at least 50 percent of the cost incurred for personnel with its own employees;

(2) For supplies or products (other than a procurement from a nonmanufacturer of such supplies or products), at least 50 percent of the cost of manufacturing the supplies or products (not including the cost of materials);

(3) For general construction, at least 15 percent of the cost with its own employees (not including the cost of materials); or

(4) For construction by special trade contractors, at least 25 percent of the cost with its own employees (not including the cost of materials).

(b) *Compliance period.* An EDWOSB or WOSB contractor is required to comply

Federal Acquisition Regulation

Pt. 22

with the limitation on subcontracting—

(1) For a contract that has been set aside or awarded on a sole source basis, either by the end of the base term and then by the end of each subsequent option period or by the end of the performance period for each order issued under the contract, at the contracting officer's discretion; and

(2) For an order set aside as described in 8.405–5 and 16.505(b)(2)(i)(F) or for an order issued directly to an EDWOSB or WOSB contractor in accordance with 19.504(c)(1)(ii), by the end of the performance period for the order.

(c) *Nonmanufacturer rule.* See 19.505(c) for application of the nonmanufacturer rule, inclusive of waivers and exceptions to the nonmanufacturer rule.

[85 FR 11767, Feb. 27, 2020]

19.1508 Contract clauses.

(a)(1) The contracting officer shall insert the clause 52.219–29, Notice of Set-Aside for, or Sole Source Award to, Economically Disadvantaged Women-owned Small Business Concerns, in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, EDWOSB concerns under 19.1505(b) or 19.1506(a). This includes multiple-award contracts when orders may be set aside for EDWOSB concerns as described in 8.405–5 and 16.505(b)(2)(i)(F) or when orders may be issued directly to one EDWOSB contractor in accordance with 19.504(c)(1)(ii).

(2) For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

(b)(1) The contracting officer shall insert the clause 52.219–30, Notice of Set-Aside for, or Sole Source Award to, Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program, in solicitations and contracts for acquisitions that are set aside for, or awarded on a sole source basis to, WOSB concerns under 19.1505(c) or 19.1506(b). This includes multiple-award contracts when orders may be set aside for WOSB concerns eligible under the WOSB program as described in 8.405–5 and

16.505(b)(2)(i)(F) or when orders may be issued directly to one WOSB contractor in accordance with 19.504(c)(1)(ii).

(2) For contracts that are set aside, the contracting officer shall indicate in paragraph (e) of the clause whether compliance with the limitations on subcontracting is required at the contract level or order level.

[76 FR 18311, Apr. 1, 2016. Redesignated at 80 FR 81891, Dec. 31, 2015. Redesignated and amended at 85 FR 11767, 11768, Feb. 27, 2020]

PARTS 20–21 [RESERVED]

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Sec.

22.000 Scope of Part.

22.001 Definitions.

Subpart 22.1—Basic Labor Policies

22.101 Labor relations.

22.101–1 General.

22.101–2 Contract pricing and administration.

22.101–3 Reporting labor disputes.

22.101–4 Removal of items from contractors' facilities affected by work stoppages.

22.102 Federal and State labor requirements.

22.102–1 Policy.

22.102–2 Administration.

22.103 Overtime.

22.103–1 Definition.

22.103–2 Policy.

22.103–3 Procedures.

22.103–4 Approvals.

22.103–5 Contract clauses.

Subpart 22.2—Convict Labor

22.201 General.

22.202 Contract clause.

Subpart 22.3—Contract Work Hours and Safety Standards Act

22.300 Scope of subpart.

22.301 Statutory requirement.

22.302 Liquidated damages and overtime pay.

22.303 Administration and enforcement.

22.304 Variations, tolerances, and exemptions.

22.305 Contract clause.

Subpart 22.4—Labor Standards for Contracts Involving Construction

22.400 Scope of subpart.